

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1100

Filed: 5 November 2019

Pitt County, Nos. 16 CRS 51635, 51655

STATE OF NORTH CAROLINA

v.

WILLIAM CHRISTOPHER RUSHING

Appeal by defendant from judgments entered 17 August 2016 by Judge Walter H. Godwin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

Paul F. Herzog for defendant-appellant.

ARROWOOD, Judge.

William Christopher Rushing (“defendant”) appeals from judgments entered against him for assault inflicting serious bodily injury, assault on a female, and habitual misdemeanor assault. For the reasons that follow, we find no error.

I. Background

In May 2016, a Pitt County grand jury indicted defendant for assault inflicting serious bodily injury, assault on a female, assault on a child under twelve years of

STATE V. RUSHING

Opinion of the Court

age, and habitual misdemeanor assault.¹ The case came on for trial on 16 and 17 August 2016 in Pitt County Superior Court before the Honorable Walter H. Godwin.

The evidence of the State tended to show that defendant and Ms. Keyosha Leachman (“Ms. Leachman”) had an eleven-year-old child, of whom defendant had physical custody on weekends. On Sunday, 6 March 2016, defendant and Ms. Leachman got into a heated argument as Ms. Leachman was attempting to pick up their child from defendant’s mother’s home. As the argument escalated, defendant pushed Ms. Leachman.

Having been assaulted by defendant in the past, Ms. Leachman drew a pocket knife and stabbed defendant in the chest. In the ensuing brawl, defendant threw Ms. Leachman’s head into the concrete, disarmed her, punched her again, threw her into the concrete driveway, and dragged her across the driveway. Ms. Leachman—still attempting to fight back—was able to get to her feet. Wanting Ms. Leachman to “stay down,” defendant punched her one last time, flinging her onto the hood of her car. Defendant finally relented after a neighbor threw herself over Ms. Leachman.

Ms. Leachman testified that she was immediately taken to the hospital after defendant assaulted her. At the hospital, she was told by physicians that she had

¹ Defendant pleaded guilty to the habitual misdemeanor assault charge prior to trial.

STATE V. RUSHING

Opinion of the Court

sustained two concussions. In addition to scrapes and bruises on her scalp, she also received six stitches on her hand and one stitch on her leg.

Among these other injuries, defendant's assault of Ms. Leachman inflicted significant damage to her left eye. In an effort to reduce the pain in her eye, the lights in her hospital room were turned off. Detective Sonya Verdin from the Greenville Police Department testified that Ms. Leachman "was in very obvious pain" when they spoke to one another at the hospital. Ms. Leachman stayed at the hospital for three hours.

It was determined that the orbital (socket) of her left eye had been fractured during the assault. She was given several sutures near her eye. Due to her fractured eye socket and swelling around her eye, Ms. Leachman was rendered temporarily blind in her left eye. This complete blindness continued for one week. As a result, Ms. Leachman was not permitted to drive for one week. Ms. Leachman's overall facial swelling took five days to subside with the aid of medication. Her black eye lasted for a week and a half. Her vision in her left eye was not fully restored for two weeks, and she could not return to work until after her vision was restored. Ms. Leachman further testified regarding her orbital fracture in the present tense: "I actually have an orbital fracture, . . . what your eye sits on, the socket part is broken."

At the close of the State's evidence, defendant moved to dismiss all charges against him. The trial court granted the motion to dismiss for the charge of assault

STATE V. RUSHING

Opinion of the Court

on a child under twelve years of age, but denied the motion as to the rest of the charges. Defendant renewed his motion to dismiss the charges at the close of all the evidence, which the trial court denied. On 17 August 2016, defendant was found guilty of assault inflicting serious bodily injury and assault on a female. Defendant failed to properly give notice of appeal; however, we granted defendant's petition for *writ of certiorari* to review defendant's case.

II. Discussion

On appeal, defendant raises several arguments: (1) the indictment fails to allege the crime of assault inflicting serious bodily injury; (2) the State failed to present substantial evidence that defendant's assault inflicted serious bodily injury upon the victim; and (3) defendant should be resentenced for the class A1 misdemeanor of assault inflicting serious injury. We address each contention in turn.

A. Sufficiency of the Indictment

In the case *sub judice*, the indictment alleged that defendant "unlawfully, willfully and feloniously did assault [Ms.] Leachman and inflict serious bodily injury, several lacerations to the face resulting in stitches and a hematoma to the back of the head." Defendant argues that this language merely describes the *misdemeanor* crime of assault inflicting serious injury. We disagree. The indictment alleged the offense of assault inflicting serious bodily injury by reciting the words of the statute itself: "[A]ny person who assaults another person and inflicts *serious bodily injury* is guilty

STATE V. RUSHING

Opinion of the Court

of a Class F felony.” N.C. Gen. Stat. § 14-32.4(a) (2017) (emphasis added); *see also State v. James*, 321 N.C. 676, 680-81, 365 S.E.2d 579, 582 (1988) (“The general rule is that an indictment for a statutory offense is facially sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.”).

The additional descriptions of Ms. Leachman’s injuries in the indictment are irrelevant to its validity, and may be disregarded as incidental to the salient statutory language. *See State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (“Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded”), *appeal dismissed, disc. rev. denied*, 359 N.C. 195, 608 S.E.2d 63 (2004). Therefore, in accordance with our policy that “[q]uashing indictments is not favored[.]” *State v. Flowers*, 109 N.C. 841, 844, 13 S.E. 718, 719 (1891) (citation omitted), we hold that the indictment in this case was facially valid.

B. Motion to Dismiss

Defendant argues that the trial court erred in denying both motions to dismiss because the State failed to present substantial evidence that defendant’s assault on Ms. Leachman resulted in her “serious bodily injury.” We disagree.

1. Standard of Review

A trial court should deny a criminal defendant's motion to dismiss if there is substantial evidence of (1) each essential element of the offense charged, and (2) the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citation omitted). Evidence is considered "substantial" if it is relevant and a reasonable mind might accept such evidence as "adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (citation omitted), *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980). On appeal, the trial court's denial of a motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

2. "Serious Bodily Injury"

Defendant was charged with committing assault inflicting serious bodily injury in violation of N.C. Gen. Stat. § 14-32.4, which requires the State to establish two elements: "(1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 619 (2002) (citations omitted) [hereinafter *Williams I*].² Everyone concedes that an assault was perpetrated by defendant against Ms. Leachman. The issue is whether the State has presented sufficient evidence to support a determination that Ms. Leachman suffered serious bodily injury.

"Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious

² There are two cases by the name *State v. Williams* we use in our analysis. For ease of reading, they will respectively be labeled *Williams I* and *Williams II*.

permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a).

In this case, the trial court instructed the jury only on a portion of the statute: that, in order to convict, they must find a serious bodily injury that “creates or causes a permanent or protracted loss/impairment of the function of any bodily member or organ.” Thus, we are limited to this instruction in determining whether there is sufficient evidence to allow a jury to find this element of the offense. *See State v. Rouse*, 198 N.C. App. 378, 382, 679 S.E.2d 520, 524 (2009) (“It is well settled that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury.” (internal quotation marks omitted)). Whether a serious bodily injury can be found “depends upon the facts of each case and is generally for the jury to decide under appropriate instructions.” *Williams I* at 502, 563 S.E.2d at 619 (citation omitted).

3. “Protracted Impairment”

None of the injuries that Ms. Leachman suffered were permanent in nature. Thus, we must determine whether her injuries resulted in a protracted loss or impairment of the function of any bodily member or organ. In doing so, we focus our inquiry on the injury Ms. Leachman suffered to her left eye. The eye is clearly a

bodily member or organ, and damage to vision is an “impairment” of the eye’s function. *See State v. Kremski*, 222 N.C. App. 318, 729 S.E.2d 732, 2012 WL 3192720, at *5 (2012) (unpublished) (holding fractures around eye causing potentially permanent forty percent loss in vision qualified as permanent or protracted loss or impairment of function of a bodily member or organ).

Accordingly, the issue here turns on whether the term “protracted impairment” encompasses an eye injury that results in complete blindness for a week and impaired vision for two weeks. Webster’s Dictionary defines “protracted” as “prolong[ed] in time or space: continue[d.]” *Protract*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/protract> (last visited Sept. 25, 2019). We have previously declined a defendant’s offer to define “protracted” to mean “not for a short period of time, but for a long period of time, just short of a permanent condition.” *State v. Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *5 (2016) (unpublished). Injuries which cause impairments to the loss or function of a body part may, in certain circumstances, qualify as “protracted” even where they are healed within the month of the assault. *Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4-5 (where victim’s broken jaw had to be wired shut for four weeks, evidence was sufficient to support jury finding of “protracted loss or impairment of the function of any bodily member or organ”).

STATE V. RUSHING

Opinion of the Court

Here, the jury heard ample testimony from which it could conclude that Ms. Leachman's loss of vision was sufficiently "continued" and "extended in time" after the assault to qualify as a "protracted" impairment of the function of her left eye. Ms. Leachman testified that the fracture to her eye socket and associated swelling rendered her left eye completely blind for a week and caused damage to her vision that was not fully restored for two full weeks after the assault. She could not drive during the first week and was unable to return to work until her vision was completely restored. Furthermore, she testified about her fractured eye socket in the present tense at trial. Therefore, the evidence viewed in a light most favorable to the State is sufficient to submit to the jury the issue of whether Ms. Leachman suffered a "protracted loss or impairment of the function of a bodily member or organ."

The cases relied upon by defendant and the dissent do not compel a different result. Defendant has cited a litany of cases, claiming they stand for the proposition that the injuries therein did not rise to the level of "serious bodily injury." *See State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000); *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001); *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994); *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240, *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2001), *cert. denied*, 537 U.S. 1217, 154 L. Ed. 2d 1071 (2003); *State v. Washington*, 142 N.C. App. 657, 544 S.E.2d 249, *appeal dismissed, disc. rev. denied*, 353 N.C. 532, 550 S.E.2d 165 (2001). This reliance is misplaced. In each of these

STATE V. RUSHING

Opinion of the Court

cases, the evidence of injury was held *sufficient* to withstand a motion to dismiss on some variant of assault with a deadly weapon inflicting *serious injury*. The deciding court did not have occasion to rule upon, or even speculate, whether the evidence of injury supported a finding of serious bodily injury.

Additionally, the dissent cites several cases in which more damaging injuries with longer lasting effects have been found sufficient to support a finding of serious bodily injury. *See State v. Jamison*, 234 N.C. App. 231, 758 S.E.2d 666 (2014); *Williams I*, 150 N.C. App. 497, 563 S.E.2d 616 (2002); *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009) [hereinafter *Williams II*]. While previous cases that turn on the particular facts of that case can be instructive, they are not controlling. In fact, we have previously discouraged the practice of using the injuries in our precedent cases as measuring posts for determining whether or not the evidence before us is sufficient to support a finding of serious bodily injury. *Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4 (unpublished) (“[O]ur inquiry [] must focus not on whether the victim’s injuries were more or less serious than the injuries suffered in [another case], but instead on whether the record contains substantial evidence that [the victim] suffered an ‘injury that create[d] or cause[d] permanent or protracted loss or impairment of the function of any bodily member or organ.’”).

Moreover, *Williams I* was decided upon jury instructions different from the case at bar. *Williams I* at 503, 563 S.E.2d at 620 (jury instructed on serious bodily injury as “an injury that creates or causes a permanent or protracted condition that causes extreme pain”). Though the victim’s injury in *Williams I* was arguably more serious than Ms. Leachman’s injury in the instant case, this Court addressed neither impairment of the function of any of the victim’s body parts nor whether any such impairment was sufficiently “protracted.” *Williams I* is thus inapposite for comparison to the evidence now before us.

The jury instruction in *Jamison* was substantially similar to that of the instant case. *Jamison* at 235, 758 S.E.2d at 669. While their effects lasted longer, many of the victim’s injuries and resulting complications are similar to those of Ms. Leachman. *Id.* at 235-36, 758 S.E.2d at 670 (holding, among other evidence, testimony of injuries such as “broken bones in her face . . . and an eye so beat up and swollen that she [] could not see properly out of it” sufficient for a finding of serious bodily injury).

The dissent has pointed to no cases in which an injury comparable to that of Ms. Leachman was held insufficient to support a finding of protracted impairment to the function of a bodily member or organ. The dissent correctly notes that the focus of our inquiry is whether the injury to Ms. Leachman’s eye was temporally “protracted.” The dissent then endeavors to distinguish *Smalls* based upon the

greater degree of medical treatment required to heal the victim's injury. Distinguishing *Smalls* on this ground is irrelevant to the issue now before us. In *Smalls*, evidence of an impairment lasting four weeks was held sufficient to submit the charge of assault inflicting serious bodily injury to the jury. 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4-5. We can find no meaningful distinction between an impairment lasting two weeks and one lasting four weeks that would compel us to remove from the jury an issue which is "generally for the jury to decide under appropriate instructions." *Williams I* at 502, 563 S.E.2d at 619 (citation omitted).

We do not hold that the injury to Ms. Leachman's eye was a serious bodily injury as a matter of law. Viewing the evidence offered at trial in a light most favorable to the State, there was substantial evidence sufficient for a reasonable juror to find that defendant's assault of Ms. Leachman caused her to suffer an injury resulting in a protracted loss or impairment of the function of a bodily member or organ. Considering Ms. Leachman's testimony on the nature and duration of her left eye injury and her resulting loss of vision, which included complete blindness in her left eye for a week and diminished vision for two weeks, a reasonable juror could have found that defendant's assault inflicted an injury upon Ms. Leachman that resulted in a protracted impairment of the function of her left eye. Therefore, we hold that the

trial court did not err in denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury.

C. Jury Instruction for Lesser Included Offenses

In his final assignment of error, defendant maintains that he should be resentenced for the class A1 misdemeanor of assault inflicting serious injury. At the close of evidence, the trial court inquired into "whether assault inflicting serious injury . . . is a lesser[-]included offense of assault inflicting serious bodily injury." Both the State and counsel for defendant agreed that simple assault was the only lesser-included offense of assault inflicting serious bodily injury. The jury was subsequently instructed on the offense of felonious assault inflicting serious bodily injury, as well as the offense of simple assault.

Defendant never objected to the instructions, nor did he request that an instruction on the offense of assault inflicting serious injury be submitted to the jury. Absent such preservation of the issue, we are not required to review this assignment of error. *See* N.C.R. App. P. 10(a)(2) (2019) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection . . ."). In criminal cases, this Court may review unpreserved issues on appeal under a plain error standard. N.C.R. App. P. 10(a)(4). Nevertheless, we have also held that a

STATE V. RUSHING

Opinion of the Court

criminal defendant's failure to argue plain error on appeal waives appellate review. *See State v. Call*, 349 N.C. 382, 416, 508 S.E.2d 496, 517 (1998). Nowhere in defendant's brief is there any mention of plain error review. We therefore dismiss this assignment of error.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge DIETZ concurs.

Judge ZACHARY concurs in part and dissents in part, with separate opinion.

ZACHARY, Judge, concurring in part, dissenting in part.

I concur with the majority’s analysis in parts II(A) and II(C), regarding the sufficiency of the indictment and the trial court’s failure to instruct the jury on the lesser-included offense. However, I depart from my colleagues with respect to part II(B), regarding the denial of Defendant’s motion to dismiss the charge of assault inflicting serious bodily injury.

In its instructions to the jury, the trial court narrowly defined a “serious bodily injury” as one that “creates or causes a permanent or protracted loss/impairment of the function of any bodily member or organ.” As the majority correctly notes, it is undisputed that none of the victim’s injuries were permanent in nature; thus, the remaining question is whether her injuries resulted in a protracted loss or impairment of the function of any bodily member or organ. Because I do not agree that the victim’s injuries, from which she fully recovered in two weeks, constitute a “serious bodily injury” under the “protracted loss or impairment” theory of culpability, I respectfully dissent.³

I.

Neither this Court nor our Supreme Court has conclusively determined when an injury is to be considered “protracted.” It is evident, however, that where the jury instructions narrowly define a “serious bodily injury” as one that “creates or causes a

³ To clarify, my analysis is confined to this limited definition of “serious bodily injury.” My analysis does not apply to cases in which the jury is instructed on alternative or multiple definitions of “serious bodily injury.”

permanent or protracted loss/impairment of the function of any bodily member or organ,” the typical inquiry in accordance with the entire statutory definition is not appropriate. See N.C. Gen. Stat. § 14-32.4(a) (2017) (“ ‘Serious bodily injury’ is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.”). In evaluating the serious bodily injury in such cases, we must disregard the circumstances underlying the assault, the types of injuries sustained, and the intent of the attacker. Instead, an inquiry into the existence of a “protracted” injury is more objectively grounded in the temporal persistence of the injury. Put differently, the nature of the offense hinges on the length of the victim’s period of recovery from the injury.

In its analysis, the majority first consults a dictionary to establish that an injury from which it takes two weeks to recover may constitute a protracted loss or impairment of the function of any bodily member or organ, determining that the word “protract[ed]” means “prolong[ed] in time or space: continue[d].” Majority Op. at 8 (citing *Protract*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/protract> (last visited Oct. 15, 2019)). While ordinarily dictionaries are valuable tools for appellate courts, in this context, the definition of the word “protracted” is not useful; it is redundant and nebulous. Under this broad

definition, any injury that impairs any bodily organ and “continue[s]” for any amount of time would meet the temporal threshold to qualify as a serious bodily injury. Thus, the definition of “protract” is unhelpful in determining when a victim’s injury is one that creates or causes a protracted loss or impairment of the function of any bodily member or organ.

The majority maintains that “we have previously discouraged the practice of using the injuries in our precedent cases as measuring posts for determining whether or not the evidence before us is sufficient to support a finding of serious bodily injury.” Majority Op. at 10 (citing *State v. Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4 (2016) (unpublished)). The *Smalls* Court stated that “our inquiry . . . must focus not on whether the victim’s injuries were more or less serious than the injuries suffered in [another case], but instead on whether the record contains substantial evidence that [the victim] suffered an ‘injury that create[d] or cause[d] permanent or protracted loss or impairment of the function of any bodily member or organ.’” *Smalls*, 2016 WL 223812, at *4. I agree.

This does not, however, preclude our reference to published cases and other binding authorities for guidance in future decisions. Indeed, lacking a statutory definition on which to base our analysis, we *must* seek direction from cases in which a similar jury instruction was given, and review the injuries and recovery times of those victims. This adherence to precedent protects both the rights of the accused

and the role of the judiciary. *See Hill v. Atl. & N.C. R.R. Co.*, 143 N.C. 539, 573, 55 S.E. 854, 866 (1906) (“The doctrine of *stare decisis*, commonly called the doctrine of precedents, has been firmly established in the law The precedent thus made should serve as a rule for future guidance in deciding analogous cases . . .”).

The majority also cites *Smalls* in support of its conclusion on this issue. *Smalls*, 2016 WL 223812, at *5. In *Smalls*, the victim suffered injuries that required him to have his jaw wired shut for four weeks as a result of the defendant’s assault. *Id.* The jury instructions in *Smalls* were nearly identical to those in the case at bar, and the defendant was found guilty of assault inflicting serious bodily injury. *Id.* at *2, *5. On appeal, the defendant argued that “the State failed to present sufficient evidence that [the victim’s] injury caused him to suffer any permanent or protracted loss or impairment of the function of any bodily member or organ.” *Id.* at *3. This Court held that the trial court properly denied the defendant’s motion to dismiss, and upheld his conviction. *Id.* at *4-5.

In determining that the evidence was sufficient to withstand the defendant’s motion to dismiss, our Court considered the extended nature of the victim’s loss, including the length of his recovery. The victim required emergency surgery, during which physicians repaired two breaks in the victim’s jaw by “applying bars across [his] teeth and wiring the bars to the teeth and then wiring the upper teeth to the lower teeth and then making two separate incisions near [the] jaw fractures to expose

the bone and attach two titanium plates with screws.” *Id.* at *2 (internal quotation marks omitted). The victim was “unable to speak, eat, or open his mouth” during the four-week period while his jaw was wired shut, and he “lost 15 pounds, which was more than 10% of his body weight.” *Id.* at *1-2. Moreover, the victim’s doctor testified that the injury “could result in issues with malocclusion or jaw pain *later in life.*” *Id.* at *2 (emphasis added) (internal quotation marks omitted). It is therefore clear that the *Smalls* victim’s injuries resulted in a continued impairment of multiple bodily organs, and required a much lengthier recovery than did those of the victim in the present case.

As compared to other published cases involving similar jury instructions, here, the victim’s period of loss and recovery was notably shorter. The assault that the victim endured left her blind in her left eye for one week, and she suffered diminished vision for an additional week thereafter. Swelling from her eye injury subsided five days after the incident. In contrast, the victims in similar cases in which the injuries were determined to be protracted had much longer recoveries. *See, e.g., State v. Williams*, 201 N.C. App. 161, 169-70, 689 S.E.2d 412, 416 (2009) [*Williams II*] (beating left the victim unable to have sex for seven months); *State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 620 (2002) [*Williams I*] (observing that the assault resulted in the victim’s broken jaw that was wired shut for two months, and

recurring back spasms that persisted up to trial and required multiple return visits to the hospital after the initial beating).

Furthermore, unlike other cases, here, the State offered no medical testimony regarding any “protracted loss or impairment of the function of any bodily member or organ” suffered by the victim as a result of the injuries she sustained in the assault. Medical testimony involving the extent and persistence of a victim’s injuries is often noted by this Court in reviewing these cases. *See, e.g., State v. Williams*, 255 N.C. App. 168, 180, 804 S.E.2d 570, 578 (2017) [*Williams III*]; *Williams I*, 150 N.C. App. at 503, 563 S.E.2d at 620; *Smalls*, 2016 WL 223812 at *2.

The majority also observes that at trial, the victim testified that her orbital socket was still fractured. However, her statement, “I actually have an orbital fracture,” does not clearly indicate that her eye *impairment* had lingered to the time of trial. She did not testify that her vision was impaired after the two-week period of recovery, nor did the State question her regarding the lasting impairment.

There is no meaningful allusion to any injuries lingering beyond the two-week period that it took for the victim’s eye to heal. *See State v. Jamison*, 234 N.C. App. 231, 235-36, 758 S.E.2d 666, 670 (2014) (concluding that the victim’s “ongoing trouble with her hand and eye” at the time of trial, one year later, was dispositive (emphasis added)). Most of the victim’s testimony was related to the attack itself, or her two-week recovery period. Thus, the facts of this case, as they relate to the jury

instructions on “serious bodily injury,” warranted dismissal of the charge of assault inflicting serious bodily injury because the evidence was insufficient to establish that the victim suffered an injury that caused a “protracted loss or impairment of the function of any bodily member or organ.”

II.

I reach my conclusion in spite of the brutal beating that the victim endured. While her injuries may constitute a serious bodily injury under the full statutory definition, given the temporally grounded instructions submitted to the jury in this case on the charge of assault inflicting serious bodily injury, the trial court erred in denying Defendant’s motion to dismiss.

I do not purport to establish the minimum length of recovery time necessary to demonstrate a protracted loss or impairment of the function of any bodily member or organ, but in light of the unique facts and circumstances of this case, I conclude that the victim’s two-week recovery is insufficient. Accordingly, I respectfully dissent from this portion of the majority’s opinion.