COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

TONY LYNN HEARD,		§	No. 08-21-00177-CR
	Appellant,	§	Appeal from the
v.		§	77th Judicial District Court
THE STATE OF TEXAS,		§	of Freestone County, Texas
	Appellee.	§	(TC# 20-033CR)

O P I N I O N

Appellant, Tony Lynn Heard, appeals his conviction for indecency with a child by exposure in violation of Texas Penal Code § 22.11(a)(2)(A). In a single issue, Appellant complains the trial court erred in failing to properly tailor the jury charge to include only those *mens rea* definitions applicable to the offense, asserting he was egregiously harmed as a result. We affirm.[1]

BACKGROUND

Factual Background

In June of 2019, the complainant, 16-year-old S.W., was working at a Texas Burger and Subway restaurant. Appellant, S.W.'s co-worker, was employed as a cook.[2] At trial, S.W.

[1] This case was transferred from our sister court in Waco (10th District), and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

[2] Appellant was 44 years' old at the time.

described her dealings with Appellant as friendly; Appellant was "a good employee" and helped her with her side work and other work duties at times. S.W. testified that one day, Appellant slapped her on her behind as she walked past him at work. Sometime thereafter, during the county's "fair week[,]" Appellant called S.W. from work, asking her to stop by Texas Burger because it was his last day working there.

S.W. and her friend, T.B., went to the Texas Burger, where they were already planning to eat on their way to the fair. After arriving and ordering their food, Appellant asked S.W. to go outside with him through the side door, where there was a drive-thru. S.W. complied with Appellant's request, and once they were both outside, Appellant hugged S.W. and began kissing her on the lips with an open mouth.

S.W. testified they somehow ended up at the back of the building near a fence, in an area that was out of view, at which point Appellant started kissing her again. After that, Appellant partially pulled down his pants, pulled out his penis, grabbed S.W.'s hand and placed it on his penis, and then directed her to kiss his penis. S.W. testified she did kiss Appellant's penis "after he became more persistent," but it was "just a peck." The next day, Appellant showed up to S.W.'s work, apologized, and asked her if she knew what he was apologizing for. S.W. replied, "Yes, for what you did last night."

S.W.'s Various Statements About The Offense

At trial, S.W. remembered telling T.B., on the car ride to the fair, about the kissing, but she admittedly was unsure about what else she told her.[3]

[3] During cross-examination, S.W. stated she did tell T.B. about kissing Appellant's penis, but T.B. testified S.W. did not tell her about that.

During direct-examination, S.W. testified she did not tell her parents or report the incident to law enforcement because she had "a pretty good reputation and . . . didn't want [her] parents to be mad at [her]." S.W. did not tell her parents or law enforcement about the June 2019 incident until after her supervisor (whom she told about Appellant having kissed her and put her hand on his penis) confronted Appellant at work some months later when Appellant called S.W. at work and, again, asked her to meet him behind the Subway building. S.W. testified her dad was scary, so she only told him about the kissing, and she likewise failed to tell her mother that she had kissed Appellant's penis because she was afraid to tell her the whole story and was embarrassed. S.W. also failed to tell the police that she had kissed Appellant's penis, testifying she omitted that fact because her mother did not yet know about it. S.W. also testified that when she was interviewed by a child forensic interviewer, she did not tell her about kissing Appellant's penis.

During cross-examination, S.W. admitted it would have been possible for she and Appellant to have been seen by patrons of the Texas Burger/Subway and neighboring restaurants during the June 2019 incident.

The Parties' Arguments And Theories Of The Case

Appellant's theory of the case was that S.W. was not credible because, not only did she provide inconsistent statements to her friend, mother, law enforcement, and the child-advocacy-center (CAC) forensic interviewer, but the location where S.W. claimed the offense took place was well lit and readily visible to the public, such that the offense could not have taken place.

In turn, the State argued S.W., who held herself to a certain standard, was mad at herself for allowing the offense to happen to her, she was embarrassed to admit the full extent of what had happened, and as the CAC forensic interviewer had testified, it was normal for victims of sexual abuse to disclose their stories incrementally. The prosecutor argued, despite the discrepancies in

S.W.'s various statements to others, S.W.'s story had remained consistent on the fact that Appellant had pulled out his penis, so even if the jury acquitted Appellant of the charged offense, he was at least guilty of the lesser-included offense of indecency with a child by exposure.

The Jury Charge

The abstract portion of the jury charge instructed the jury on the culpable mental states as follows:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that her conduct is reasonably certain to cause the result.

On the lesser-included offense of indecency with a child, the application paragraph of the jury charge stated as follows:

> If you find beyond a reasonable doubt that, on or about [the] 14th day of June, 2019, in Freestone County, Texas, [the defendant] did then and there, with the intent to arouse or gratify the sexual desire of the defendant, expose the defendant's genitals, knowing that [S.W.], a child younger than 17 years of age, was present, then you will find the defendant guilty of the lesser-included offense of Indecency with a Child.

Appellant did not object to the jury charge.

Procedural Background

Appellant was charged and tried for sexual assault of a child by contact. TEX.PENAL CODE ANN. § 22.011(a)(2)(E). A jury acquitted him of sexual assault of a child by contact but found him guilty of the lesser-included offense of indecency with a child by exposure and assessed punishment at five years' confinement and a $10,000 fine. This appeal followed.

DISCUSSION

In his sole issue, Appellant asks us to reverse his conviction because the trial court erred in failing to "properly tailor the definitions to the elements to which they applied[,]" including "all 3 conduct elements rather than being limited to the nature of the actor's conduct[,]" causing him egregious harm. For the reasons that follow, we decline to do so.

Applicable Law

We review claims of jury-charge error under the two-pronged test set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985)(op. on reh'g), first determining whether error exists, and then evaluating the harm caused by the error. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex.Crim.App. 2005); *Swearingen v. State*, 270 S.W.3d 804, 808 (Tex.App.—Austin 2008, pet. ref'd). The degree of harm required for reversal depends on whether that error was preserved in the trial court. *Ngo*, 175 S.W.3d at 743.

When, as here, the appellant does not object to the complained-of jury-charge error, a reversal will be granted only if the error caused egregious harm, that is, error so harmful that it denied the accused a fair and impartial trial by affecting the very basis of the case, depriving him or her of a valuable right, or vitally affecting a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex.Crim.App. 2007); *Ngo*, 175 S.W.3d at 743-44; *Almanza*, 686 S.W.2d at 171. For both preserved and unpreserved charge error, the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Patrick v. State*, 906 S.W.2d 481, 492 (Tex.Crim.App. 1995); *Riggs v. State*, 482 S.W.3d 270, 273–74 (Tex.App.—Waco 2015, pet. ref'd). To warrant reversal, an appellant must have suffered actual, not merely theoretical, harm. *Sanchez v. State*, 376 S.W.3d 767, 775

(Tex.Crim.App. 2012). Egregious harm is a difficult standard to prove and must be proved on a case-by-case basis. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex.Crim.App. 2002).

Analysis

Appellant contends sexual assault of a child and indecency with a child are nature-of-conduct offenses, and thus, the trial court erred in including *mens rea* definitions in the jury charge pertaining to conduct elements other than nature of conduct. In response, the State argues the definition of culpable mental states is unsettled with respect to sexual offenses, so therefore, it was not error for the trial court to include full statutory definitions for both "intentional" and "knowing" culpable mental states as to the greater and lesser-included offenses in this case.

Assuming, without deciding, there was error in the jury charge, we find that Appellant did not suffer egregious harm.

At the outset, we note Appellant's conviction is the lesser-included offense of indecency with a child, which is statutorily defined as follows:

> A person commits an offense if, with a child younger than 17 years of age, . . . and regardless of whether the person knows the age of the child at the time of the offense, the person[,] . . . with the intent to arouse or gratify the sexual desire of any person[,] exposes the person's any or any part of the person's genitals, knowing the child is present[.]"

TEX.PENAL CODE ANN. § 21.11(a)(2)(A).

Appellant correctly points out that the only culpable mental state applied to the conduct in an indecency-with-a-child offense is "the intent to arouse or gratify the sexual desire of any person." *See Celis v. State*, 416 S.W.3d 419, 423 (Tex.Crim.App. 2013)("[T]he prescription of a mental state as to certain portions of a statute, but not as to others, is compelling evidence that the Legislature intended to dispense with a mental state as to the latter."); *cf. Clark v. State*, 558 S.W.2d 887, 890-91 (Tex.Crim.App. 1977)(rejecting argument that indictment for indecency with

a child was defective for failing to allege additional culpable mental state for the prohibited conduct). Here, the application portion of the jury charge tracked the statutory definition of the offense, instructing the jury that it should convict Appellant of indecency with a child if it found, beyond a reasonable doubt, that he "did then and there, *with the intent to arouse or gratify the sexual desire of the defendant*, expose the defendant's genitals, knowing that [S.W.], a child younger than 17 years of age, was present[.]" [Emphasis added].

We fail to see how the jury could have failed to apply the most natural grammatical reading of the application paragraph, which is that the phrase "with the intent to arouse or gratify the sexual desire of the defendant" modified the phrase immediately following it, *i.e.*, "expose the defendant's genitals." *See Smith v. State*, 515 S.W.3d 423, 433 (Tex.App.—Houston [14th Dist.] 2017, pet. ref'd)(reasoning application paragraph required that jury find appellant acted with intent to arouse or gratify his sexual desire where it correctly tracked statutory language for indecency with child by contact); *see also Riggs*, 482 S.W.3d at 275-76 (holding error in including inapplicable culpable-mental-state definition did not egregiously harm appellant where jury charge set out offense elements and applied them to the facts of the case). Thus, the application paragraph correctly tracked the statutory language and required that the jury find Appellant acted to expose his genitals with the required intent to arouse or gratify his sexual desire. We find that the contents of the jury charge itself weigh against a finding of egregious harm.

Next, in examining the state of the evidence, including contested issues and weight of probative evidence, and the argument of counsel, we first note Appellant does not contest the sufficiency of the evidence against him. It is well settled that a child complainant's uncorroborated testimony is, alone, sufficient to sustain a conviction for indecency with a child. TEX.CODE CRIM.PROC.art. 38.07; *see, e.g.*, *Alonzo v. State*, 575 S.W.2d 547, 548 (Tex.Crim.App. 1979);

Chasco v. State, 568 S.W.3d 254, 258 (Tex.App.—Amarillo 2019, pet. ref'd); *Mejia v. State*, No. 14-19-00432-CR, 2021 WL 3577659, at *8 (Tex.App.—Houston [14th Dist.] Aug. 10, 2021, no pet.)(mem. op., not designated for publication). Further, as the State argued to the jury, although S.W.'s outcries may have been inconsistent about whether she kissed Appellant's penis, her allegations were consistent about Appellant having pulled his penis out from his pants.

Moreover, whether Appellant intended to arouse or gratify his sexual desire was not a contested issue in the case. Appellant did not contend at trial that he accidentally exposed his genitals while S.W. was present or that he otherwise acted without the applicable, required culpable mental state; rather, his defense was that S.W.'s story was not credible or plausible, denying that the incident described by S.W. even occurred, a theory the jury evidently rejected. *See Belmares v. State*, No. 03-11-00121-CR, 2011 WL 5865236, at *3 (Tex.App.—Austin Nov. 23, 2011, pet. ref'd)(mem. op., not designated for publication)(assuming without deciding, charge was erroneous when included statutory definitions for "intentionally" and "knowingly" to result-of-conduct, nature-of-conduct, and circumstances-surrounding-conduct elements in an aggravated-sexual-assault-of-a-child case, rejecting similar claim of egregious harm where defense theory was that incident did not occur, not that appellant lacked the requisite *mens rea* to commit the offense)(citing *Saldivar v. State*, 783 S.W.2d 265, 268 (Tex.App.—Corpus Christi 1989, no. pet)(no error in submitting erroneous definitions of "intentionally" and "knowingly" where no defense presented directly affecting jury's assessment of culpable mental state); *Jones v. State*, 229 S.W.3d 489, 494 (Tex.App.—Texarkana 2007, no pet.)(finding no egregious harm in defining intentional and knowing mental states where appellant's intent in touching victim was not contested issue); *see also Foster v. State*, 530 S.W.3d 308, 312 (Tex.App.—Waco 2017, pet. ref'd)

(similarly rejecting claim of egregious harm where basis of charge error was not a hotly contested issue in the case).

Additionally, the undisputed evidence Appellant kissed S.W., exposed his penis to her after asking her to exit the restaurant with him, and asked her to kiss his penis (regardless of whether she did so or not) is sufficient to show that Appellant's exposure of his genitals was done with the intent to arouse or gratify his sexual desire. *See Martins v. State*, 52 S.W.3d 459, 474-75 (Tex.App.—Corpus Christi 2001, no pet.)(evidence legally sufficient to conclude appellant acted with intent to arouse or gratify his sexual desire where appellant exposed his genitals to the victim and asked her to give him "little kisses" while pointing to his exposed penis); *Barker v. State*, 931 S.W.2d 344, 347 (Tex.App.—Fort Worth 1996, pet. ref'd)(evidence that appellant exposed his penis to two girls in front of school was legally sufficient to support conviction for indecency with a child). Thus, we find that the state of the evidence does not support a finding of egregious harm.

We conclude that the record as whole does not demonstrate that the alleged error, if any, affected the very basis of the case or vitally affected Appellant's defensive theory such that he was deprived of a fair and impartial trial. *See Almanza*, 686 S.W.2d at 171; *see also Belmares*, 2011 WL 5865236, at *3. Appellant does not otherwise explain how he was egregiously harmed or point us to any support in the record for such a finding, nor do we, based on our own review of the record, find any. Accordingly, we overrule Appellant's sole issue and affirm his conviction.[4]

CONCLUSION

[4] The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a *pro se* petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX.R.APP.P. 25.2(d). The certification is defective, and has not been corrected by Appellant's attorney, or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to TEX.R.APP.P. 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a *pro se* petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. Appellant's attorney is further ORDERED to comply with all of the requirements of TEX.R.APP.P. 48.4.

Having overruled Appellant's sole issue, we affirm.

August 19, 2022

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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