IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0166-20

DANNY WAYNE ALCOSER, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS MCCLENNAN COUNTY

HERVEY, J., delivered the opinion of the Court in which KELLER, P.J., RICHARDSON, NEWELL, KEEL, WALKER, and MCCLURE, JJ., joined. YEARY, J., filed a concurring opinion in which SLAUGHTER, J., joined.

O P I N I O N

Danny Wayne Alcoser, Appellant, was convicted of family violence assault with a prior conviction, endangering a child, and interference with an emergency request for assistance. He appealed, arguing that he was entitled to a new trial on all counts because he was egregiously harmed by a variety of jury charge errors that impacted all three offenses. In finding egregious harm, the court of appeals considered the "cumulative effect" of all the errors. We granted review to decide whether the court of appeals erred

when it did so and whether it misapplied the egregious-harm standard. We will reverse the court of appeals' judgment as to the assault count and remand the cause for it to address Appellant's remaining points of error.

FACTS

a. Background

This case stems from a domestic disturbance. Appellant and the victim, Ursula Woessner, began dating in 2013. She had a son from a prior relationship, T.W., and shortly after Ursula and Appellant started dating, they had a son, J.W. The relationship was "on again/off again." At the time of the altercation in May 2016, T.W. was six years old and J.W. was less than one year old.

b. The Day of the Offenses

Ursula testified that there were multiple verbal altercations the day of the incident. According to her, they were all home that morning, but Appellant left at some point after they had a verbal confrontation. Appellant returned later and apologized, and Ursula let him back into the house. While she was showering, Ursula saw Appellant taking clothes out of the closet, and because she did not want him to leave again, she jumped out of the shower, mid-shower, ran over to Appellant, and asked him not to leave. She also grabbed at the clothes in his hands. According to Ursula, Appellant responded by grabbing her face and "squeez[ing] really hard" before pushing her to the ground. She said that she was in fear for her life: "I'm on the ground, and I scream, and he puts his hand on my throat,

and I'm telling him to stop and scratched at him." She said that she kept telling him things like, "You can't be here; you can't do this; the boys are here; we'll talk about it later," but he would not stop. After Appellant finally stopped choking her and things cooled down, Ursula testified that she put on some clothes, followed Appellant out of the room, and went to get J.W. because he had started crying. She set J.W. down on the couch next to T.W., then she and Appellant began arguing again in the master bedroom.

Ursula said she could not remember if she threatened to call the police first, and Appellant took her phone and broke it, or whether she screamed when he picked up a baseball bat in the room and told her, "That's it; you're dead," but Appellant started choking her again, this time on the bed. She was able to get away and ran to the living room, picked up J.W., and ran for the backdoor. Appellant was chasing her from behind holding the baseball bat. According to her, she "didn't make" to the backdoor and "couldn't get out," so she turned around and ran for the front door, but she swerved into the master bedroom at the last minute to climb out the bathroom window. Ursula was able to enter the bathroom, but she was unable to close the door before Appellant started pushing it open. He pushed the door so hard that Ursula fell backwards into the bathtub and hit her head while holding J.W. in her arms. Ursula said that she knew she needed to get away and that she did not remember how it happened, but she "got an opening" and made it to the front door with J.W. While she was leaving the house with J.W., she told T.W. to run with her to a neighbor's house. The neighbor called police. Appellant was not

at the house when the police arrived.

Appellant told a different story. He testified that he entered the house because he thought Ursula and the children were not home and that he walked to the master-bedroom closet to gather some clothes. He acknowledged that T.W. was in the living room playing video games, but he claimed that he did not hear or see him. He also acknowledged that Ursula was taking a shower in the master bathroom (a fact that he could not deny given the following altercation), but he claimed not to notice when he entered the room and walked to the master-bedroom closet door, which was three feet from the bathroom door where Ursula was showering. According to Appellant, while he was gathering clothes, someone came out the bathroom and started hitting him on the back of the head, so he turned around and forced whoever it was into the closet and onto the ground. He conceded that he might have grabbed the person around the throat when he pushed the person down, and pictures taken by police showed red marks on Ursula's neck. Appellant said that, after he realized it was Ursula who had been assaulting him, he took some of his clothes and tried to leave the room, but Ursula grabbed at the clothes he was holding, and he dropped them. After picking up what he could, Appellant said that he left the house and drove away in his truck. He claimed that he did not break Ursula's phone, threaten her with a baseball bat, chase her around the house, choke her a second time, or push her down and into the bathtub while she was holding J.W.

After the incident, Appellant wrote Ursula a series of letters asking her not to

cooperate with the police and prosecutors and to execute an affidavit of non-prosecution. She eventually executed the affidavit, and Appellant wrote her a letter with corrections to the affidavit. In the affidavit of non-prosecution, Ursula asked for Appellant not to be prosecuted, but she did not say that the assaults did not happen, and although he never admitted that he committed the assaults, Appellant apologized to Ursula in numerous letters.

PROCEDURAL HISTORY

Appellant was indicted for family violence assault with a prior conviction, endangering a child, interference with an emergency request for assistance, and evading arrest or detention. The State severed the evading count before trial. A jury convicted Appellant of the three other offenses. He was sentenced to 20 years' imprisonment and fined $10,000 for the family-violence assault conviction, a second-degree felony. He was sentenced to two years' imprisonment and fined $10,000 for the child-endangerment conviction, a state-jail felony, and he was sentenced to one year confinement and fined $4,000 for the interference-with-an-emergency-request-for-assistance conviction, a Class A misdemeanor. The judge ordered the sentences to run concurrently.

Appellant appealed his convictions, raising four points of error. Relevant to this case, he argued in two points that he was egregiously harmed by jury charge errors. *Alcoser v. State*, 596 S.W.3d 320, 326 (Tex. App.—Amarillo 2019). According to him, the jury charge instructions erroneously applied the applicable culpable mental states, and

the self-defense instruction lacked an application paragraph and definition of "reasonable belief." *Id.* The court of appeals agreed, concluding that the jury was "not properly instructed on any of the offenses" and instead "received a hodge-podge of inappropriately defined terms and offenses." *Id.* at 338 (emphasis in original). The court of appeals then held that Appellant was egregiously harmed by the cumulative errors in the charge dealing with all three counts and reversed all his convictions. *Id.* The State filed a timely petition for discretionary review, which we granted, asking us to determine if the court of appeals erred in its harm analysis.

JURY CHARGES

"[T]he jury is the exclusive judge of the facts," but the trial court submits a charge to the jury "distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. arts. 36.13, 36.14. The charge is meant to inform the jury of the applicable law and how to apply it to the facts of the case. *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007). Abstract paragraphs "serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge," and application paragraphs apply the "pertinent penal law, abstract definitions, and general legal principles to the particular facts and the indictment allegations." *Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012). Reversible error in the giving of an abstract instruction generally occurs only when the instruction is an incorrect or misleading statement of a law that "the jury must understand in order to implement the

commands of the application paragraph," and the "failure to give an abstract instruction is reversible only when such an instruction is necessary to a correct or complete understanding of concepts or terms in the application part of the charge." *Plata v. State*, 926 S.W.2d 300, 302 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997). Further, a jury charge must include instructions informing the jurors "'under what circumstances they should convict, or under what circumstances they should acquit' . . . ." *Ex parte Chandler*, 719 S.W.2d 602, 606 (Tex. Crim. App. 1986).

A jury-charge-claim analysis involves two steps: First, we determine whether the charge is erroneous. If it is, then we must decide whether the appellant was harmed by the erroneous charge. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013); *see Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). There are two standards of review for jury-charge-error claims. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). If a defendant timely objects to alleged jury-charge error, the record need only show "some harm" to obtain relief. *Id.* If there was not a timely objection, the record must show "egregious harm." *Id.* Harm is assessed "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of [the] probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Id.* An erroneous jury charge is egregiously harmful if it affects the very basis of the case, deprives the accused of a valuable right, or vitally

affects a defensive theory. *Id.* A finding of egregious harm must be based on "actual harm rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). Egregious harm is a difficult standard to meet, and the analysis is a fact-specific one. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). Neither party bears the burden to show harm. *Marshall v. State*, 479 S.W.3d 840, 842–43 (Tex. Crim. App. 2016).

COURT OF APPEALS

The court of appeals identified an array of jury charge errors that took multiple pages to set out. It found errors in instructions that affected all the offenses. Some erroneous instructions affected only one offense, but at least one other affected all three offenses,

Definition of "*Knowing*"

- The court's charge included a single, incorrect definition of "knowing"[1] fashioned from different parts of the definition, and the

[1]The definition of "knowing" in the jury charge stated: "A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware that his conduct is reasonably certain to cause the result." That definition is wrong because it confuses the difference between a person who acts knowingly with respect to the nature of his conduct, a person who acts knowingly with respect to the circumstances surrounding his conduct, and a person who acts knowingly with respect to the result of his conduct, all of which are distinct issues. Section 6.03(b) defines "knowingly" as,

> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to 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 his conduct is reasonably certain to cause the result.

error affected all the offenses because they could all be committed knowingly,

Self -Defense

- The placement of the self-defense instructions was erroneous because they were placed after the application paragraph for interference with an emergency request for assistance and said that they applied to the elements "listed above,"

- The term "unlawful force" was not defined,

- The term "reasonable belief" was not defined,

- The charge did not instruct the jury to find Appellant not guilty should it find the elements of the defense true,

- The charge does not include a presumption-of-reasonableness instruction informing the jury that it must presume that Appellant's belief that the use of force was immediately necessary to protect himself was reasonable under certain circumstances,

Child Endangerment

- There was no abstract paragraph listing the elements of the offense,

- The application paragraph contains an impermissible comment on the weight of the evidence because it conflates two elements of the offense and did not require the jury to find that Appellant intentionally acted *and* that "pushing the child's mother into or against the bathtub while the child's mother was holding the child" placed the child "in imminent danger of death, bodily injury, or physical or mental impairment,"[2]

TEX. PENAL CODE § 6.03(b).

[2]That instruction states that Appellant,

did then and there intentionally or knowingly or recklessly or with criminal

- The culpable-mental state "intentional" was incorrect because it was tailored only to "result oriented" offenses but endangering a child is a "nature of conduct" offense,

- The culpable-mental state "recklessly" was incorrect because it was tailored only to "result oriented" offenses, but endangering a child is a "nature of conduct" offense,

- The culpable-mental state "criminal negligence" was erroneous because the definition was not limited to "nature of conduct" offenses,

Interference with an Emergency Request for Assistance

- There was no abstract paragraph listing the elements of the offense, and

- There were no statutory definitions.

Alcoser, 596 S.W.3d at 329–38. The court of appeals subsequently held that Appellant was egregiously harmed by the cumulative errors and reversed all of Appellant's convictions. *Id.* at 338.

ANALYSIS

The State does not dispute that the court of appeals correctly reversed Appellant's convictions for endangering a child and interference with an emergency request for assistance, so we do not address them. Rather, it argues that the court of appeals was

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> negligence, engage in conduct that placed [the victim], a child younger than fifteen (15) years of age, in imminent danger of death, bodily injury, or physical or mental impairment, by pushing the child's mother into or against the bathtub while the child's mother was holding the child,

mistaken to consider the erroneous instructions relating to those offenses when deciding to also reverse Appellant's family-violence assault conviction. According to the State, each offense in a multi-count jury-charge case should always be separately analyzed. Appellant responds that the court of appeals was correct to consider the "cumulative effect" of the erroneous instructions in its egregious-harm analysis. Alternatively, Appellant argues that, even if the court of appeals was wrong to do so and each offense should be analyzed separately, he nonetheless suffered egregious harm from the incorrect family-violence and self-defense instructions.

In a multi-count case, erroneous or omitted instructions often affect only one count. For example, some of the flawed instructions for endangering a child and interference with an emergency request for assistance do not affect the family-violence assault or self-defense instructions. The only erroneous instruction that affected all three offenses was the incorrect definition of "knowing" because the trial court included only one definition of "knowing" that applied to all three offenses. We cannot rule out the possibility that erroneous or omitted instructions, or a combination thereof, could have a synergistic effect, resulting in harm even though the errors considered alone would not, but that is not the case here.

a. Self-Defense

"[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against

the other's use or attempted use of unlawful force." TEX. PENAL CODE § 9.31(a). A "reasonable belief" is "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(42). In certain circumstances, a defendant's belief that the use of unlawful force was immediately necessary is presumed reasonable:

> The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor . . . knew or had reason to believe that the person against whom the force was used:
>
> (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
>
> * * *
>
> (2) did not provoke the person against whom the force was used; and
>
> (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

Id. § 9.31(a).

b. Relevant Jury Charge Instructions

SELF DEFENSE

> If you all agree the State has proved, beyond a reasonable doubt, each of the elements listed above, you must next consider whether the defendant's use of force was made in self-defense.
>
> You have heard evidence that, when the altercation between the defendant and Ursula Woessner occurred the defendant Danny Wayne Alcoser believed his use of force was necessary to defend himself against Ursula Woessner's use or attempted use of unlawful force.
>
> A person's use of force against another that would otherwise constitute the

> crime of Assault is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use or attempted use of unlawful force.
>
> Self-defense does not cover conduct in response to verbal provocation alone. The Defendant must have reasonably believed the other person had done more than verbally provoke the Defendant.
>
> BURDEN OF PROOF
>
> The Defendant is not required to prove self-defense. Rather, the State must prove, beyond a reasonable doubt, that self-defense does not apply to the Defendant's conduct.

* * *

c. *Almanza* Factors

1. The Jury Charge

I. Definitions

It is true that the definition of "knowing" is wrong, but the error was harmless as to Appellant's family-violence assault conviction because Appellant admitted to intentionally assaulting Ursula, though he claimed he did so in self-defense. It is also true that the statutory definition "reasonable belief" should have been included in the charge. We have said that "[t]he meaning of 'reasonable belief' is consistent with its common understanding, except that a jury must consider the belief from the defendant's viewpoint." *Arline v. State*, 721 S.W.2d 348, 353 n.7 (Tex. Crim. App. 1986). We have also explained in the context of a "some harm" *Almanza* analysis that, even though a jury might not know to consider a defendant's belief from his viewpoint if the statutory

definition of "reasonable belief" is omitted from the charge, the omission can be harmless if other instructions adequately inform the jury that it must view the defendant's conduct from his viewpoint. *See id.* at 353. There were no such instructions in this case.

ii. Placement of the Self-Defense Instructions

With respect to the placement of the self-defense instructions, the court of appeals said that the first sentence of the instructions was confusing because the first instruction stated that, "[i]f you all agree that the State has proved, beyond a reasonable doubt, each of the elements *listed above*, you must next consider whether the defendant's use of force was made in self-defense." *Alcoser*, 596 S.W.3d at 334 (emphasis in original). The paragraph directly above the self-defense instruction was the application paragraph for interference with a request for emergency assistance. Appellant notes that the complained-of instruction mentioned, "Assault," but he argues that the jury could have been confused about which offense self-defense applied to because of the "listed above" language and because the jury might have believed that Appellant acted in self-defense when he broke Ursula's phone. We agree that the placement of the self-defense instructions is not ideal, but the instructions referred to Appellant believing that his use of force against Ursula was immediately necessary to defend himself from Ursula, and Appellant did not use force against Ursula when he broke her phone. We do not think that a jury would have been confused about which offense self-defense applied to.

iii. Self-Defense Application Paragraph

According to the court of appeals, the self-defense application paragraph was incomplete because "merely restating Appellant's claim of self-defense is not the same as instructing the jury to find him not guilty should they find the elements of the affirmative defense to be true." The State argues that any error in the burden-of-proof instructions is harmless under *Luck v. State*, 588 S.W. 2d 371, 375 (Tex. Crim. App. 1979). The State asserts that, as in *Luck*, the charge here "'required the jury to acquit appellant if they believed that he was acting in self-defense or the jury had a reasonable doubt thereof,'" and it contained instructions on the presumption of innocence, which we said, when viewed as a whole, properly places the burden on the State to show beyond a reasonable doubt that Appellant was not acting in self-defense. *Id.* Appellant responds that *Luck* is distinguishable, and he is correct. When self-defense is law applicable to the case, the trial court must inform the jury under what circumstances it should acquit a defendant of an offense based on self-defense. *Mendez v. State*, 545 S.W.3d 548, 556 (Tex. Crim. App. 2018). Here, there are no such instructions in the charge, nor any other instructions that would clarify the issue. *See Barrera v. State*, 982 S.W.2d 415, 417 (Tex. Crim. App. 1998) (citing TEX. PENAL CODE § 2.03(d)); *Luck*, 588 S.W.2d at 375.

iv. Omission of the Presumption of Reasonableness Instructions

The court of appeals concluded that the omission of presumption-of-reasonableness instruction "left the jury completely free to speculate on the applicability of Appellant's self-defense theory." *Alcoser*, 596 S.W.3d at 336.

Appellant argues that omission of an instruction on the statutory presumption and an instruction telling the jury how to implement the presumption in accordance with Section 2.05(b) deprived him of a favorable presumption that was "law applicable to the case."[3] According to him, omission of the instruction is especially damaging because the disputed evidence supports that the presumption of reasonableness might apply. The State does not address this issue in its brief. The harm caused by some of the errors in the jury charge

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[3]Section 2.05 states in part,

> (b) When this code or another penal law establishes a presumption in favor of the defendant with respect to any fact, it has the following consequences:
>
> > (1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and
> >
> > (2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption, that:
> >
> > > (A) the presumption applies unless the state proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist;
> > >
> > > (B) if the state fails to prove beyond a reasonable doubt that the facts giving rise to the presumption do not exist, the jury must find that the presumed fact exists;
> > >
> > > (C) even though the jury may find that the presumed fact does not exist, the state must prove beyond a reasonable doubt each of the elements of the offense charged; and
> > >
> > > (D) if the jury has a reasonable doubt as to whether the presumed fact exists, the presumption applies and the jury must consider the presumed fact to exist.

TEX. PENAL CODE § 2.05(b).

depend on the other *Almanza* factors. We conclude that, despite the numerous errors throughout the jury charge, given our analysis of all the *Almanza* factors, Appellant has not been egregiously harmed.

2. State of the Evidence

Everyone agrees that the central issue at trial, which was hotly contested, was whether Appellant acted in self-defense. Appellant claims that the evidence shows that the presumption of reasonableness would have applied because the State offered no evidence that Appellant entered the home unlawfully, the parties disputed who started the altercation, and the parties disputed whether Appellant committed any offense other than potentially assaulting Ursula in self-defense, like whether he broke her cell phone. The State argues that the court of appeals misleadingly gave the impression that both Appellant's and Ursula's versions of events were credible, but "[s]uch a view is alien to the actual record." According to the State, Ursula's account was credible and supported by the physical evidence while Appellant's version was inconsistent, contradictory, and self-serving. The State concedes that Ursula signed an affidavit of non-prosecution, but it argues that she never wavered in her story or said that Appellant was not guilty.

The State is correct that the weight of the evidence shows that Ursula's testimony is more credible than Appellant's. However, the evidence supporting Appellant's self-defense theory was not as weak as in some of our other cases, like *Villarreal*. In *Villarreal*, we explained that implausible self-defense evidence makes it difficult to

support an egregious-harm finding because a harm finding must be based on actual harm. *See Villarreal*, 453 S.W.3d at 436. In that case, multiple witnesses testified that the appellant did not act in self-defense, and the physical evidence supported the testimony of the witnesses. Here, the only witnesses who were present and testified were Appellant and Ursula. Moreover, while the evidence supports that Ursula had red marks on her neck, Appellant conceded that he might have grabbed Ursula around her neck when he forced her to the ground in the closet. *See id.* at 439 ("Appellant's version of events was not only in conflict with the testimony of every other witness at trial, all of whom testified that [the victim] was at all times unarmed and that appellant stabbed him multiple times in an act of aggression, but it was also inconsistent with the physical evidence."). The next question is the likelihood that the outcome of the self-defense question would have been different had the jury been properly instructed. *Id.* We conclude that it is possible but unlikely. Nonetheless, we believe that this factor supports an egregious-harm determination because the evidence was not strong enough that the jury necessarily would have believed beyond a reasonable doubt that the State proved that the presumption did not apply. Although this factor weighs in favor of finding egregious harm, we do not accord it great weight for the reasons that follow.

3. Arguments of the Parties

The court of appeals found that the arguments of counsel weighed in favor of finding egregious harm, but the only error it identified that impacted its harm analysis was

that the State focused on the intentional nature of Appellant's assaultive conduct, which Appellant admitted, and not on the result of that conduct—causing injury. *Alcoser*, 596 S.W.3d at 337. We agree that the State briefly talked about whether Appellant intentionally engaged in the conduct, not that he intended the result, but that argument was harmless in light of the fact that the jury was correctly instructed on the definition of intentional as it pertained to assault family violence. The remainder of the court of appeals's analysis focused on endangering a child and interference with a request for emergency assistance and the impact of the various erroneous instructions. While self-defense was the central issue, the parties framed the issue as one of general credibility—did the jury believe Ursula's story or Appellant's story? Neither party mentioned whether Appellant's belief that the use of force was immediately necessary was reasonable or unreasonable, what "reasonable belief" means, or whether the presumption of reasonableness applied. And while the State never expressly told the jurors that self-defense applied only to the assault charge, as Appellant argues, we think it is a reasonable inference to draw from the State's and Appellant's arguments. Defense counsel specifically noted that, "Self-defense takes care of the first incident." The clear implication being that the jury should acquit Appellant for the closet incident based on self-defense. We also note Appellant's use of a fabrication defense as to the bathtub incident and his argument that the State had not met its burden of proof because of a "sloppy" police investigation. The parties' arguments heavily weigh in favor of not

finding egregious harm because they suggest only theoretical harm.

4. Any Other Considerations in the Record

The court of appeals wrote that,

> The jury was not properly instructed on any of the offenses. Instead, it received a hodge-podge of inappropriately defined terms and offenses. While this court acknowledges that egregious harm is a "high and difficult standard," we conclude the multiple errors in the charge had the cumulative effect of depriving Appellant of a fair trial and vitally affected his defensive theory.

Id. at 338. As we noted before, it is possible that a synergistic effect based on multiple charge errors in a multi-count jury charge could weigh in favor of finding harm when consideration of the errors in isolation would not, but most errors can be readily isolated to discrete counts, and should be. Failure to allocate jury charge errors that affect only particular counts might give defendants the windfall of a new trial based on only theoretical harm, something *Almanza* expressly forbids.

5. Summary

While there were numerous errors in the jury charge dealing with the family-violence assault and the self-defense instructions, they were either harmless or were not points of contention that were litigated at trial, rendering the risk of egregious harm, as we have mentioned, only a theoretical one. Further, although the jury charge did not contain an instruction that it must acquit Appellant if it found he acted in self-defense, defense counsel argued that the jury should acquit Appellant based on self-defense, and the charge included instructions on the presumption of innocence and informed the jury

that the State bore the burden of disproving self-defense beyond a reasonable doubt. On this record, we conclude that Appellant was not egregiously harmed because the erroneous jury charge did not vitally affect his defensive theory.

CONCLUSION

Because we conclude that Appellant was not egregiously harmed as to his assault-family-violence conviction, we reverse the court of appeals' judgment and remand the cause for the court of appeals to address Appellant's remaining points of error.

Delivered: March 30, 2022

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