COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DONNA GAIL KERSEY,		§	No. 08-20-00037-CR
	Appellant,	§	Appeal from the
v.		§	207th Judicial District Court
THE STATE OF TEXAS,		§	of Comal County, Texas
	Appellee.	§	(TC# CR2018-325)

O P I N I O N

A jury found Appellant Donna Gail Kersey guilty of one count of possession with intent to deliver a controlled substance in penalty group one in an amount of 4-200 grams (Count I), and one count of unlawful possession of a firearm by a felon (Count II). The trial court found the State's enhancement allegation true, and sentenced Appellant to twenty years' imprisonment on Count I, and fifteen years' imprisonment on Count II. On appeal, Appellant challenges her conviction in one issue, arguing that the jury charge was erroneous and caused egregious harm by: (1) directing the jury to acquit her of a greater offense before considering her guilt of a lesser offense; (2) including non-statutory instructions in the jury charge that improperly commented on the weight of the evidence; and (3) failing to tailor the definitions of the offenses' applicable

culpable mental states to the appropriate conduct element. For the reasons set forth below, we affirm the trial court's judgment.[1]

I. BACKGROUND

A. Appellant's Arrest

Deputy Cameron Celli of the Comal County Sheriff's Office was assigned to the Direct Deployment Unit, a proactive unit intended to prevent crimes before they occurred. While on patrol in a high-crime area of Comal County, Texas, he observed a van that had been previously parked outside of a house that was well-known for narcotics trafficking. According to another deputy, Sergeant Duane Buethe, the van was known in the neighborhood as the "ice cream truck," and law enforcement had previously suspected the vehicle of being associated with narcotics trafficking.

After following the van for a short distance, Deputy Celli initiated a traffic stop of the van when the driver failed to properly signal a turn. After effecting the stop, Deputy Celli made contact with the driver, Kayla Rollins, whom Deputy Celli and other deputies on scene recognized from their previous interactions with her. According to Deputy Celli, Rollins exhibited signs of nervousness, such as shaking, sweating, and breathing rapidly. One of the passengers in the rear seat of the van, Michael Tonan, was moving constantly, had his face in his hands, and "mouthed a four-letter word, a cuss word." Appellant, who is Tonan's girlfriend, was also sitting in the rear seat.

Based on his suspicion of illegal activity, Deputy Celli asked for and obtained Rollins consent to search the van. After the van's occupants exited the van, a drug-sniffing dog alerted

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

to the outside of the van. The dog then went into the van and alerted to the van's rear passenger area. Sergeant Buethe entered the van and found a handgun in plain view on the van's floorboard.

A subsequent search of the van's interior yielded a small black case that contained: (1) small plastic bags commonly used in narcotics trafficking; (2) drug paraphernalia; (3) a digital scale; (4) a metal spoon used to prepare methamphetamine for consumption; and (5) a substance that tested positive for methamphetamine. Deputy Celli opined that when these items are found together, it indicates that the owner is selling narcotics. Both the black case and the handgun were found within arm's reach of Tonan's and Appellant's positions when they were seated in the van. Deputies also located a purse in the van's back seat that contained hypodermic needles and loaded magazine-clips that were compatible with the handgun found on the van's floorboard. Based on his investigation, Deputy Celli believed that Appellant was the owner of the purse. Although Tonan told the deputies that the narcotics and handgun belonged to him, because the deputies believed that all the van's occupants had care, custody, control, or management over the narcotics and the handgun, the deputies arrested Rollins, Tonan, and Appellant for possession of the contraband.

B. The Trial

The State charged Appellant with one count of possession with intent to deliver a controlled substance in penalty group one in an amount of 4-200 grams (Count I), and one count of unlawful possession of a firearm by a felon (Count II). The State further alleged that Appellant had previously been convicted of possession of a controlled substance in penalty group one in an amount of 1-4 grams, a felony offense. At trial, the State presented: (1) testimony from Deputy Celli and other witnesses involved in the investigation; (2) the narcotics, handgun, magazines, and ammunition seized from the van; (3) a series of text messages from Appellant's cell phone that

described various narcotics-trafficking activities; and (4) a call Appellant made while she was in jail awaiting trial, in which she told her sister that she needed to delete information from her cell phone. In response, Appellant presented Tonan's testimony that the narcotics and handgun belonged to him, and that he had sent the text messages from Appellant's cell phone that referenced narcotics trafficking.

After the presentation of the parties' cases, the trial court submitted a jury charge (described in greater detail below) to which neither party objected. In closing argument, Appellant's counsel argued that the "bottom line" was that evidence showed that Tonan, not Appellant, owned the narcotics and handgun, and that Appellant was unaware that the contraband was present in the van. Nonetheless, the jury found Appellant guilty of both counts. After the trial court found the State's enhancement allegation to be true, it sentenced Appellant to twenty years' imprisonment on Count I and fifteen years' imprisonment on Count II, with the sentences running concurrently. Appellant filed a motion for new trial that was overruled by operation of law. This appeal follows.

II. ISSUES ON APPEAL

Appellant raises one broad issue on appeal complaining that the jury charge was erroneous, causing her egregious harm. The argument under that issue, however, raises three distinct complaints regarding the charge, that we discuss separately for the sake of clarity. Appellant first argues that the charge was erroneous because it directed the jury to acquit her of a greater offense (possession with intent to deliver methamphetamine in an amount of 4-200 grams) before it considered her guilt for a lesser offense (possession of methamphetamine in an amount of 4-200 grams). Next, Appellant argues that the charge included non-statutory definitions of "joint possession" and "mere presence," which constituted improper comments on the weight of the evidence. Finally, Appellant argues that the charge contained both the nature-of-conduct and

result-of-conduct definitions for the terms "intentionally" and "recklessly," and thus the charge did not tailor the relevant culpable mental states associated with the charged offenses. As to all three arguments, Appellant claims the errors caused her egregious harm that deprived her of a fair trial.

III. DISCUSSION

A. Applicable Law and Standard of Review

When analyzing claimed error in a jury charge, we utilize a two-pronged test. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005) (en banc); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984) (en banc) (op. on reh'g). The first prong requires us to determine whether error exists. *Ngo*, 175 S.W.3d at 743. If no error is found, then the analysis ends; however, if charge error is found, the error is analyzed for harm. *Almanza*, 686 S.W.2d at 171.

The amount of harm necessary to warrant a reversal depends on whether the accused objected to the jury charge, and thereby preserved the error. *Ngo*, 175 S.W.3d at 743; *Almanza*, 686 S.W.2d at 171; *see also Neal v. State*, 256 S.W.3d 264, 278 (Tex.Crim.App. 2008). If the error was preserved by a timely objection, we review the record to determine if the error caused the accused "some harm." *Ngo*, 175 S.W.3d at 743; *Almanza*, 686 S.W.2d at 171. However, if no objection was lodged, as Appellant concedes here, we review the unpreserved jury-charge error for egregious harm. *Almanza*, 686 S.W.2d at 171. Egregious harm is actual, rather than theoretical harm, and must be of such a nature that it affected the very basis of the case, deprived the accused of a fair and impartial trial, or otherwise vitally affected the accused's defensive theory at trial. *See Villarreal v. State*, 453 S.W.3d 429, 433 (Tex.Crim.App. 2015); *Cosio v. State*, 353 S.W.3d 766, 777 (Tex.Crim.App. 2011). "Egregious harm is a 'high and difficult standard' to meet, and such a determination must be 'borne out by the trial record.'" *Villarreal*, 453 S.W.3d

at 433, *quoting Reeves v. State*, 420 S.W.3d 812, 816 (Tex.Crim.App. 2013).

In making an egregious-harm determination, we examine: (1) the entire charge; (2) the state of the evidence, including contested issues and the weight of the evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *See Allen v. State*, 253 S.W.3d 260, 264 (Tex.Crim.App. 2008). Neither the defendant nor the State has the burden of proving or disproving egregious harm. *Reeves*, 420 S.W.3d at 816, *citing Almanza*, 686 S.W.2d at 171.

B. Jury's Consideration of Greater and Lesser Offenses

We first consider Appellant's argument that the trial court erred by requiring the jury to first acquit her of the greater possession-with-intent-to-distribute offense before considering her guilt of the lesser possession offense. Appellant contends that this sequencing of the jury's deliberations deprived her of the right to have the jury fairly consider whether she was only guilty of the lesser included charge. For the following reasons, we find that the trial court did not err.

1. Applicable law

In *Barrios v. State*, 283 S.W.3d 348, 349 (Tex.Crim.App. 2009), the jury charge set out the elements of the charged capital-murder offense and included the following instruction in the event that the jury did not find proof of that offense beyond a reasonable doubt:

> Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of robbery.

The charge further instructed the jury to "acquit the defendant of robbery" unless it found from the evidence beyond a reasonable doubt that he was guilty of robbery. *Id*. The charge also contained the following benefit-of-the-doubt instruction:

> If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of either capital murder on the one hand or robbery on the other hand, but

> you have a reasonable doubt as to which of said offenses he is guilty, then you must resolve that doubt in the defendant's favor and find him guilty of the lesser offense of robbery.

Id. at 350. The jury convicted the defendant of capital murder. *Id*. On direct appeal, the defendant argued that the charge was erroneous because it instructed the jury that it should unanimously agree that he was not guilty of capital murder before it could consider the lesser-included offense of robbery. The court of appeals rejected this argument and affirmed the conviction. *Id*. On petition for discretionary review, the defendant argued that the charge was erroneous because: (1) the sequencing instruction required the jury to unanimously agree to acquit him of capital murder before it could consider the lesser-included offense of robbery; and (2) the sequencing and benefit-of-the-doubt instructions were mutually exclusive, and thus the instruction on benefit-of-the-doubt was superfluous. *Id*. at 351-52.

The Court of Criminal Appeals held that the charge was not erroneous and rejected these arguments as stemming from a "narrow interpretation of the charge." *Id*. at 352-53. The court first recognized that the "inartful use" of the "will acquit" language in the charge has the potential to confuse a jury, and thus it would be a better practice for trial courts to include an instruction that "explicitly informs the jury that it may read the charge as a whole, and to substitute 'or if you are unable to agree, you will next consider' for 'you will acquit . . . and next consider[.]'" *Id*. Even so, the court reasoned that the charge was not erroneous because the charge still allowed the jury to consider the entire charge as a whole. *Id*. Moreover, the court reasoned that juries are allowed to make their own decisions about the order in which they consider the parts of charges, and thus there was no issue posed by the charge's sequencing instruction. *Id*. at 352-53. Finally, the court stated that because a trial court reads the entirety of the charge before deliberations begin, if "the jurors cannot agree as to guilt on the greater offense, they have already been instructed that they

may consider guilt as to the lesser offense before deciding on a verdict as to the greater offense." *Id*. at 353.

2. Kersey's charge instructions are not erroneous

In this case, the court issued the following instruction that immediately preceded the application paragraph of the greater offense (possession with intent to deliver a controlled substance):

> Unless you so find from the evidence beyond a reasonable doubt or if you have a reasonable doubt thereof, you will acquit the Defendant and say by your verdict "Not Guilty." If, and only if, you have found the Defendant "Not Guilty" of the offense of possession with intent to deliver a controlled substance as charged in the indictment, you shall next consider whether the Defendant committed the lesser included offense of possession of a controlled substance, namely, Methamphetamine, in an amount of four grams or more but less than 200 grams. If you have found the Defendant "Guilty" of the offense of possession with intent to deliver a controlled substance as charged in the indictment, you shall not consider the lesser included offense. Rather, you shall proceed directly to and consider only Count II of the indictment.

Following the application paragraph for the lesser-included offense (possession of a controlled substance), the court included the following instruction:

> Unless you so find from the evidence beyond a reasonable doubt or if you have a reasonable doubt thereof, you will acquit the Defendant and say by your verdict, "Not Guilty." Regardless of your verdict, you shall proceed to consider Count II of the indictment.

Finally, under the "General Instructions" section, the charge instructed the jury: "In your deliberations you will consider this charge as a whole." Neither party objected to these instructions.

Appellant raises essentially the same claim as made in *Barrios*, i.e., that the charge instructed the jury that it must unanimously vote to acquit her of the greater possession-with-intent-to-deliver charge before it could consider her guilt of the lesser possession charge. Appellant contends that the charge in *Barrios* is distinguishable because the charge here contained language

that "left no doubt" that the jury was to acquit Appellant of the greater offense before considering the lesser offense. We disagree.

Like *Barrios*, the trial court here read the charge to the jury before it retired to deliberate; thus, the court had already instructed the jury that it could have considered Appellant's guilt as to the lesser offense before they considered her guilt as to the greater offense.[2] *See Barrios*, 283 S.W.3d at 353. Likewise, the charge explicitly instructed the jury to "consider this charge as a whole," and in the absence of contrary evidence, of which we find none here, we presume that the jury followed the court's instructions and were not confused by them. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex.Crim.App. 2005); *see also Ruiz v. State*, No. 03-19-00551-CR, 2021 WL 3233858, at *4 (Tex.App.--Austin July 30, 2021, no pet.) (mem. op, not designated for publication). Finally, the charge instructed the jury to acquit Appellant of both the greater possession-with-intent-to-distribute and lesser possession charges if the jurors had a reasonable doubt as to her guilt for those offenses.

Appellant argues that *Barrios* is distinguishable because the charge in that case included a benefit-of-the-doubt instruction that is missing from the charge in this case. But the Court of Criminal Appeals did not base its decision on the presence of that instruction; rather, the defendant in that case argued that the instruction was superfluous because it was mutually exclusive with the charge's sequencing instruction. *See Barrios*, 283 S.W.3d at 352-53. Moreover, the trial court had no duty to include the instruction *sua sponte*, and because Appellant did not request the instruction, the court did not err by failing to include the instruction. *See Simms v. State*, No. 06-

[2] Although the reporter's record does not contain the trial court's recitation of the entire charge, the court stated on the record that the charge was placed on a screen for the jury to follow along as he was reading the charge, and the transcript contains the notation "(Charge read)." We will presume that the record accurately reflects that the court read the entirety of the charge to the jury prior to the parties' closing arguments and the jury's deliberations.

18-00181-CR, 2019 WL 2479845, at *9 (Tex.App.--Texarkana June 14, 2019, pet. ref'd) (mem. op., not designated for publication), *citing Benavides v. State*, 763 S.W.2d 587, 589 (Tex.App.--Corpus Christi 1988, pet. ref'd). And where, as here, the charge instructs the jury that if it finds reasonable doubt that the defendant is guilty of the charged offense, it should acquit the defendant of that offense and consider the lesser offense, "no further 'benefit of the doubt' instruction is necessary." *Ruiz*, 2021 WL 3233858, at *5, *quoting Benavides*, 763 S.W.2d at 589.

In sum, because: (1) the trial court read the charge to the jury before its deliberations began; (2) the charge explicitly instructed the jury to consider the charge as a whole during its deliberations; and (3) the charge instructed the jury to acquit Appellant of both charged offenses if it had a reasonable doubt of her guilt, we find that the charge was not erroneous in this regard. *See Barrios*, 283 S.W.3d at 352-53; *Ruiz*, 2021 WL 3233858, at *4.

This part of Appellant's Issue One is overruled.

C. Non-statutory Definitions of "Joint Possession" and "Mere Presence"

Next, we consider whether the trial court erred by issuing non-statutory definitions of "joint possession" and "mere presence" in the charge. Although we find that the court erred by including the definitions, we also find that the errors did not cause egregious harm.

1. The charge's instructions are erroneous

"The purpose of the jury charge is to inform the jury of the applicable law and guide them in its application to the case." *Beltran De La Torre v. State*, 583 S.W.3d 613, 617 (Tex.Crim.App. 2019), *quoting Hutch v. State*, 922 S.W.2d 166, 170 (Tex.Crim.App. 1996) (en banc). Because the trial court must maintain neutrality in providing such information and guidance, it may not express any opinion on the weight of the evidence or draw the jury's attention to particular facts. *Beltran*, 583 S.W.3d at 617, *citing Brown v. State*, 122 S.W.3d 794, 798 (Tex.Crim.App. 2003);

see also TEX.CODE CRIM.PROC.ANN. art. 36.14 (stating that a jury charge must not "express[] any opinion as to the weight of the evidence"). Generally, definitions for terms that are not statutorily defined are not considered to be "applicable law" under article 36.14, and thus it is usually error for the trial court to define those terms in the jury charge because they "frequently constitute impermissible comments on the weight of the evidence." *Beltran*, 583 S.W.3d at 617; *Green v. State*, 476 S.W.3d 440, 445 (Tex.Crim.App. 2015).

In *Beltran*, the Court of Criminal Appeals held that both joint-possession and mere-presence instructions constituted impermissible comments on the weight of the evidence because the instructions were unnecessary to clarify the applicable law, and because they tended to draw the jury's attention to the evidence supporting a party's theory of the case. 583 S.W.3d at 622-23. In that case, the trial court submitted a charge that included a non-statutory definition on joint possession that stated: "Two or more people can possess the same controlled substance at the same time." *Id*. at 616. The defendant also requested a mere-presence instruction that stated: "Mere presence at a place where narcotics are found is not enough to constitute possession," but the trial court denied his request and did not include that instruction in the charge. *Id*. The Court of Criminal Appeals held that the joint-possession instruction was erroneous (and the mere-presence instruction would have been erroneous had the trial court issued it) because the instructions impermissibly focused the jury's attention on particular evidence, thus constituting improper comments on the weight of the evidence. *Id*. at 622-23.

Here, the jury charge contained the following instruction in the charge's definition section:

> "Possession" means actual care, custody, control, or management. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of her control of the thing for a sufficient time to permit her to terminate her control.
> Possession need not be exclusively with the Defendant. Joint possession is sufficient if the evidence shows beyond a reasonable doubt that the Defendant

> exercised actual care, custody, control or management of the alleged controlled substance. Mere presence alone is insufficient to prove possession.

Neither party objected to these instructions. On appeal, Appellant argues that under *Beltran*, both the joint-possession and mere-presence instructions included in the charge constituted improper comments on the weight of the evidence. The State does not contest that point, but rather argues that the inclusion of the instructions in the charge did not result in egregious harm. We agree with Appellant that under *Beltran*, both the joint-possession and mere-presence instructions commented on the weight of the evidence because the instructions tended to draw the jury's attention to: (1) the State's theory that joint possession was an issue at trial; and (2) Appellant's theory that her mere presence at the scene was insufficient evidence to support her guilt. Thus, these instructions were erroneous. *See Beltran*, 583 S.W.3d at 622-23.

2. The record does not indicate egregious harm

Having found that the joint-possession and mere-presence instructions included in the charge were erroneous, we turn to whether there was any egregious harm from the error under the *Almanza* factors. *See Almanza*, 686 S.W.2d at 171.

a. The jury charge

In this case, the court included the joint-possession instruction in a sequential paragraph along with the statutory definition of "possession." *See* TEX.PENAL CODE ANN. § 1.07(39) (defining "possession" as "actual care, custody, control, or management"). Although the instruction stated that "[p]ossession need not be exclusively with the Defendant," it further stated that joint possession "is sufficient if the evidence shows beyond a reasonable doubt that the Defendant exercised actual care, custody, control or management of the alleged controlled substance." We agree with the State that the instruction, when read in its entirety, tended to correctly emphasize the State's burden to prove beyond a reasonable doubt that Appellant

exercised actual care, custody, control, or management of the narcotics and firearm. Moreover, the joint-possession language did not appear elsewhere in the charge. For these reasons, we find that the joint-possession instruction's potential to influence the jury's evaluation of the evidence was minimal.

Regarding the mere-presence instruction, we find that its inclusion in the charge did not harm Appellant. Instead, the instruction likely assisted in her defense because it tended to draw attention to Appellant's primary defensive theory, i.e., that the State failed to prove Appellant possessed the narcotics and handgun because they belonged to Tonan, and not Appellant, who was only present in the van. Appellant seems to at least partially concede the potential benefit of the instruction by stating the "fact that an instruction on 'mere presence' was also included does not ameliorate the harm" caused by the other errors in the charge. For these reasons, this factor weighs against a finding of egregious harm.

b. The state of the evidence

The evidence in this case established that Appellant was present in a high-crime neighborhood as a passenger in a van known locally as the "ice cream truck" because of its previously suspected involvement in narcotics trafficking. After the deputies observed the van stop in front of a house also suspected of being involved in narcotics trafficking, they conducted a traffic stop of the van and made contact with Rollins, with whom they were previously familiar. Appellant and Tonan were sitting in the rear seat of the van. Rollins, who was nervous and agitated while speaking to the deputies, consented to a search of the van, and a drug-sniffing dog alerted to the van's exterior and interior. While determining what the dog had alerted to, Sergeant Buethe saw a handgun in plain view on the van's floorboard. In the van's rear passenger compartment, deputies subsequently found a small black case containing small plastic bags, a

scale, a metal spoon, drug paraphernalia, and a substance that tested positive for methamphetamine. Appellant, who was seated in the rear passenger compartment at the time of the traffic stop, was in sufficient proximity to the case and handgun to have access to them. The deputies also found hypodermic needles and loaded magazines for the handgun in Appellant's purse, which was also located near the rear seat. Moreover, the State introduced text messages from Appellant's cell phone that referenced narcotics trafficking, as well as a phone call Appellant made while she was in jail awaiting trial, in which Appellant stated that she needed to delete information from her cell phone.

Although the evidence established that Tonan was also in close proximity to the contraband at the time of the search, and thus joint possession was raised by the evidence, the jury could have rationally found that sufficient evidence tied Appellant to the narcotics and handgun, thus establishing her knowledge of and control over the contraband.[3] Moreover, the jury was free to reject Tonan's testimony that the narcotics and handgun belonged to him. Because the evidence in the record supports Appellant's guilt, this factor also weighs against a finding of egregious harm.

c. The parties' arguments

The record demonstrates that the State repeatedly emphasized the statutory definition of

[3] To establish that an accused knowingly possessed contraband when the accused was not in exclusive control of the place where the contraband is found, the State must establish an "affirmative link" between the accused and the contraband, i.e., independent facts and circumstances which affirmatively link the accused to the contraband so as to suggest that the accused had knowledge of the contraband and exercised control over it. *See Robinson v. State*, 174 S.W.3d 320, 325 (Tex.App.--Houston [1st Dist.] 2005, pet. ref'd). Courts have recognized several factors tending to establish affirmative links, including the following factors present here: (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and accessibility of the contraband; (4) whether the defendant possessed other contraband when arrested; (5) whether other contraband or drug paraphernalia were present; (6) whether the conduct of the defendant indicated a consciousness of guilt; and (7) whether the accused was observed in a suspicious area under suspicious circumstances. *See Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex.Crim.App. 2006). Although several other affirmative-links factors are not present here, the number of factors is not as important as the logical force they collectively create to prove that a crime has been committed, and the weight of the evidence in this record evinces sufficient affirmative links to connect Appellant to the narcotics and firearm. *See id.* at 162.

"possession." During voir dire, the State posited that "possession is not just ownership of the drug. What that means is that you don't have to actually own the drug for you to be in possession of it. It has to be in your care, custody, control, or management." The State later iterated during voir dire that "if [a person does] not have care, custody control or management, . . . then they are not in possession . . . ." And in its closing argument, the State again argued that "possession" meant "care, custody, control and management of that drug." Thus, we find that any harm caused by the joint-possession instruction was ameliorated by the State's repeated emphasis of the correct statutory definition of "possession." *See* TEX.PENAL CODE ANN. § 1.07(39); *see also Gelinas v. State*, 398 S.W.3d 703, 709-10 (Tex.Crim.App. 2013) (considering the parties' arguments containing correct statements of law to weigh against an egregious-harm finding caused by an erroneous instruction).

In its closing argument, the State argued that "multiple people can be in possession of the narcotics or the firearm at the same time." Although the Court of Criminal Appeals stated in *Beltran* that a joint-possession instruction constitutes an improper comment on the weight of the evidence, it also acknowledged that the State was "free to argue that the statutory definition of 'possession' includes the concept of 'joint possession;'" thus, we find that the State's argument did not exacerbate any harm caused by the erroneous instruction. *See Beltran*, 583 S.W.3d at 620; *see also de la Torre v. State*, No. 01-17-00218-CR, 2020 WL 4689203, at *6 (Tex.App.--Houston [1st Dist.] Aug. 13, 2020, pet. ref'd) (mem. op., not designated for publication) (recognizing that the State's argument regarding joint possession was permissible and did not weigh in favor of a harm finding).

Regarding the mere-presence instruction, Appellant's counsel argued that the evidence established Tonan's ownership and possession of the contraband, thus implying that Appellant's

mere presence in the van, without sufficient affirmative links supporting Appellant's knowledge, was not enough to establish her guilt. As discussed above, this instruction actually tended to benefit Appellant's defensive theory, and arguments from Appellant's counsel emphasized the instruction. For these reasons, this factor also weighs against a finding of harm.

d. Other relevant information

Neither party points to other information in the record establishing the presence or absence of harm regarding the joint-possession and mere-presence instructions; thus, this factor does not weigh for or against a finding of egregious harm. Based on the application of the *Almanza* factors, we conclude that the record does not indicate the presence of egregious harm caused by the joint-possession and mere-presence instructions. This part of Appellant's Issue One is overruled.

D. Definitions of Culpable Mental States

Finally, we consider Appellant's argument that the trial court erred by failing to properly tailor the jury charge's definitions of "intentionally" and "knowingly" to the charged offenses' applicable conduct. We find that the trial court did not err in this regard, and even if it did, any error did not constitute egregious harm.

1. Applicable law

Section 6.03(a) of the Penal Code provides that "[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." TEX.PENAL CODE ANN. § 6.03(a). Likewise, section 6.03(b) provides that "[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." TEX.PENAL CODE ANN. § 6.03(b). Thus, with respect to the definition of "intentionally" and "knowingly," section 6.03 delineates three "conduct elements" that may be involved in an offense: (1) the nature of the conduct; (2) the circumstances surrounding the conduct; and (3) the result of the conduct. *See McQueen v. State*, 781 S.W.2d 600, 603 (Tex.Crim.App. 1989). "When 'specific acts are criminalized because of their very nature, a culpable mental state must apply to committing the act itself . . . . On the other hand, unspecified conduct that is criminalized because of its result requires culpability as to that result.'" *Price v. State*, 457 S.W.3d 437, 441 (Tex.Crim.App. 2015), *quoting McQueen*, 781 S.W.2d at 603.

Generally, a trial court should tailor the language in regard to the culpable mental states to the conduct elements of the offense. *Price*, 457 S.W.3d at 441, *citing Cook v. State*, 884 S.W.2d 485, 491 (Tex.Crim.App. 1994) (en banc). However, if an offense is not clearly categorized as to the appropriate culpable mental state, it is not error for the trial court to charge the jury on the complete statutory definitions of the applicable culpable mental states because the statutory definitions allow the jury to consider either the nature or the result of the defendant's conduct. *See, e.g.*, *Aguilera v. State*, No. 07-13-00280-CR, 2015 WL 4594118, at *3 (Tex.App.--Amarillo July 30, 2015, pet. ref'd) (mem. op., not designated for publication); *Harris v. State*, No. 02-12-00091-CR, 2014 WL 1389756, at *3 (Tex.App.--Fort Worth Apr. 10, 2014, pet. ref'd) (mem. op., not designated for publication), *citing Murray v. State*, 804 S.W.2d 279, 281 (Tex.App.--Fort Worth 1991, pet. ref'd), *Saldivar v. State*, 783 S.W.2d 265, 268 (Tex.App.--Corpus Christi 1989, no pet.), and *Bosier v. State*, 771 S.W.2d 221, 225 (Tex.App.--Houston [1st Dist.] 1989, pet. ref'd).

Although several intermediate courts of appeals have addressed the issue of whether possession of a controlled substance is a nature-of-conduct or a result-of-conduct offense, neither the Court of Criminal Appeals, the Austin court, nor this Court have squarely addressed that issue.

See, e.g., *Peek v. State*, 494 S.W.3d 156, 162 (Tex.App.--Eastland 2015, pet. ref'd) (holding that possession of a controlled substance is a nature-of-conduct offense), *but see Adams v. State*, 744 S.W.2d 622, 628 (Tex.App.--Fort Worth 1987, pet. ref'd) (stating that possession of a controlled substance "may be a 'result oriented' offense, since many cases have held that the defendant's actions resulted in possession").

2. The charge's definitions of "intentionally" and "knowingly"

In this case, the trial court submitted the following instructions that contained both the nature-of-conduct and result-of-conduct definitions of "intentionally" and "knowingly:"

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

But because it has not been firmly decided whether possession-type offenses constitute conduct- or result-oriented offenses, it was acceptable for the court to submit the full statutory definitions of those terms in the charge regarding Count I (possession with intent to distribute methamphetamine). *See Aguilera*, 2015 WL 4594118, at *3; *Harris*, 2014 WL 1389756, at *3-4.

It is unclear whether Appellant also challenges the inclusion of the result-oriented definitions of "intentionally" and "knowingly" as they pertain to Count II (unlawful possession of a firearm). That offense has previously been classified as a circumstances-surrounding-conduct offense. *See Dorsey v. State*, 623 S.W.3d 825, 835 (Tex.App.--Houston [1st Dist.] 2019, pet. ref'd). Assuming, without deciding, that the inclusion of the result-oriented definitions of "intentionally" and "knowingly" was erroneous as to Count II, we find, for the reasons described

in the following section, that any error in doing so did not result in egregious harm.

3. Any error did not cause egregious harm

Even assuming that the court erred by submitting the full definitions of "intentionally" and "knowingly," we find that any error did not result in egregious harm. The charge's application paragraph for Count I required the jury to find Appellant "knowingly possess[ed] with intent to deliver a controlled substance, namely, Methamphetamine . . . ." Likewise, the application paragraph for Count II required the jury to find Appellant "intentionally or knowingly possess[ed] a firearm . . . ." The application paragraphs thus told the jury it must find Appellant intentionally or knowingly engaged in the conduct of possession, not that she intentionally or knowingly accomplished a particular result. To the extent that a charge's focus on a result of conduct is improper in a possession case, the application paragraphs in the charge properly focused the jury on the nature of, or circumstances surrounding, Appellant's conduct.

For these reasons, we find any error in the abstract definitions of the culpable mental states was not calculated to injure appellant's rights or deprive her of a fair and impartial trial, and such error would not have constituted egregious harm. *See Aguilera*, 2015 WL 4594118, at *4 (stating that any error in including the result-oriented definitions of "intentionally" and "knowingly" in a possession-of-controlled-substance case was harmless because the application paragraphs correctly charged the jury with finding that the defendant engaged in the conduct of possession, not accomplished a particular result); *Harris*, 2014 WL 1389756, at *3-4 (stating that any error in the jury charge by including the nature-of-conduct and result-of-conduct definitions of "knowingly" was harmless because the charge's application paragraphs correctly limited the culpable mental states as charged in the indictment); *see also Medina v. State*, 7 S.W.3d 633, 640 (Tex.Crim.App. 1999) (en banc) (holding that egregious harm was not present when the trial court

erroneously included the nature-of-conduct definition of "knowingly" in a prosecution for murder, a result-oriented offense, because the application paragraph correctly tied "knowingly" to the result of the defendant's conduct).

Appellant's Issue One is overruled.

IV. CONCLUSION

The trial court's judgment is affirmed.

JEFF ALLEY, Justice

December 10, 2021

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

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