Opinion filed February 15, 2018

In The

Eleventh Court of Appeals

No. 11-16-00113-CR

RUSSELL FRANCES HUERTAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 161st District Court
Ector County, Texas
Trial Court Cause No. B-44,756

M E M O R A N D U M O P I N I O N

A jury found Russell Frances Huertas[1] guilty of the first-degree felony offenses of attempted capital murder and aggravated assault of a public servant.[2] For each offense, the trial court assessed Appellant's punishment at confinement for life and sentenced him.

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[1]We note that, in documents signed by Appellant and in both judgments, Appellant's middle name is spelled "Francis"; however, the indictment shows Appellant's middle name to be "Frances."

[2]TEX. PENAL CODE ANN. §§ 15.01(a), 19.02(b)(1), 19.03(a)(1), 22.02(a)(2), (b)(2) (West 2011 & Supp. 2017).

On appeal, Appellant raises three issues. In his first two issues, Appellant asserts that his convictions violate the Double Jeopardy Clause of the United States Constitution and Article I, Section 14 of the Texas Constitution.[3] In his third issue, Appellant argues that the trial court erred when it instructed the jury that a knife was a "deadly weapon," which he alleges caused him egregious harm. We reverse in part and affirm in part.

I. *Evidence at Trial*

Appellant left his home after a dispute with his girlfriend. He testified that he was angry because she had a continuous drug problem, and he found her with methamphetamine and a knife. Appellant himself consumed the methamphetamine, took the knife, and left the house to "to blow off steam." After he wandered through neighborhoods, he approached a woman that was parked in her driveway and frightened her. The woman called her daughter, who then called the police.

Officer Raymond Feril received the call from dispatch about Appellant's encounter with the woman and his location. Officer Feril found Appellant, got out of his patrol vehicle, and told Appellant to stop. Appellant testified that he told Officer Feril that he was not in his "right state of mind" and to leave him alone. Officer Feril testified that Appellant said, "I wouldn't do that," and continued to walk away. Appellant testified that he felt paranoid when Officer Feril came near, so he ran.

Officer Feril chased Appellant and caught up to him. Appellant turned around with a knife in his hand. Officer Feril attempted to avoid the knife by turning his body, but the knife struck him in the back and punctured his skin. A bystander at a nearby gas station, Dustin Paul Fowler, saw the stabbing. At trial, when asked

[3] *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 14.

whether he thought Appellant intended to stab the officer, Fowler answered, "Oh, yeah. It was full intent to hurt that officer, if not kill him."

After Officer Feril fell to the ground from his stab wound, he drew his firearm and held Appellant at gunpoint. Appellant told Officer Feril, "I warned you." Another officer, Sergeant Jordan Medrano, approached Appellant from behind and ordered him to drop his weapon. Appellant kept the knife in his hand, and Sergeant Medrano tased Appellant. Appellant fell to the ground, and the officers arrested him.

Officer Feril suffered a minor wound from the incident. Sergeant Medrano said that, after he looked at the wound, he realized that "it could have been a lot worse." Sergeant Medrano, who had more than twenty-eight years of experience, testified that the knife would have caused death or serious bodily injury if it had struck Officer Feril in the neck or another vital area.

II. *Analysis*

We initially address Appellant's first and second issues on double jeopardy, and then we address his complaint of alleged jury charge error.

A. Issues One and Two: Appellant's convictions for attempted capital murder and aggravated assault of a public servant violate the Double Jeopardy Clause.

In his first and second issues, Appellant asserts that his convictions for attempted capital murder and aggravated assault of a public servant violate the double jeopardy clauses of both the United States and Texas constitutions. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 14. We note that these double jeopardy claims may be addressed for the first time on appeal. *See Ex parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013) (allowing an appeal where there was a fully developed record and no legitimate state interest preventing review). Additionally, Appellant "makes no distinction between his rights under the Texas

and federal constitutions." *Luquis v. State*, 72 S.W.3d 355, 364 (Tex. Crim. App. 2002). We therefore analyze the claims together under the federal framework. The State concedes that the convictions constitute a double jeopardy violation, and we agree.

The Double Jeopardy Clause bars "multiple punishments for the same offense" in a single prosecution without clearly expressed legislative intent to the contrary. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). Absent evidence of such legislative intent, "[a] multiple-punishments double-jeopardy violation occurs if both a greater and a lesser-included offense are alleged and the same conduct is punished once for the greater offense and a second time for lesser." *Denton*, 399 S.W.3d at 546. If the prosecution necessarily must prove one charged offense by proving all the elements of another charged offense, "then that other offense is a lesser-included offense." *Id.* at 547 (quoting *Girdy v. State*, 213 S.W.3d 315, 319 (Tex. Crim. App. 2006)). To compare the offenses, "we focus on the elements alleged in the charging instrument." *Id.* at 546 (quoting *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008)).

In the indictment in this case, the first count, which was for attempted capital murder, required the State to prove that Appellant intended to commit capital murder and that Appellant intentionally or knowingly stabbed Officer Feril with a deadly weapon—a knife. The second count, which was for aggravated assault of a public servant, provided that Appellant intentionally, knowingly, or recklessly caused bodily injury to Officer Feril by stabbing him with the same knife in the same criminal episode. Both counts alleged that Appellant knew that Officer Feril was a public servant and that he was discharging a lawful duty.

Under these pleadings, the offense of attempted capital murder contains all the facts required to prove aggravated assault of a public servant. *See Johnson v. State*, 6 S.W.3d 323, 324 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)

(reasoning that a double jeopardy violation existed from the premise that "aggravated assault and attempted capital murder were the same offense for double jeopardy purposes"). The State could not have proven that Appellant stabbed Officer Feril with the intent to commit murder without proof that Appellant knowingly caused bodily injury to Officer Feril in the same stabbing. *See Meine v. State*, 356 S.W.3d 605, 610 (Tex. App.—Corpus Christi 2011, pet. ref'd) (reasoning that the act of pointing a gun with the intent to kill in a count for attempted capital murder subsumed the "intention to cause apprehension of imminent bodily injury" in a count for aggravated assault by threat). Therefore, as pleaded in this indictment, the offense of aggravated assault of a public servant is a lesser included offense of attempted capital murder. No clear evidence of legislative intent to the contrary has been shown here. We conclude that Appellant's dual convictions create a double jeopardy violation, and we sustain Appellant's first and second issues.

The remedy for a double jeopardy violation in the multiple-punishments context "is to affirm the conviction for the most serious offense and vacate the other convictions." *Bigon*, 252 S.W.3d at 372. Here, however, Appellant received a life sentence for each conviction. The Court of Criminal Appeals suggested in *Ex parte Cavazos* that "all other factors being equal, the conviction that should be affirmed is the offense named in the first verdict form." 203 S.W.3d 333, 340 n.8 (Tex. Crim. App. 2006). Following that direction, we vacate the conviction for aggravated assault on a public servant in the second count.

B. Issue Three: The jury charge error did not cause Appellant to suffer egregious harm.

In his third issue, Appellant asserts that the trial court erred when it instructed the jury that a knife is a deadly weapon and that the error resulted in egregious harm. We review the alleged error in the jury charge in two steps: we determine "(1) whether error existed in the charge; and (2) whether sufficient harm resulted

from the error to compel reversal." *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). We note that Appellant did not object to the jury charge at trial. Therefore, we will not reverse for charge error "unless the record shows 'egregious harm' to the defendant." *Id.* (quoting *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2006).

1. The jury charge included error because it provided that a knife is a deadly weapon per se.

The court charged the jury as follows: "'Deadly weapon' means anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." This definition was correct. *See* PENAL § 1.07(a)(17)(B). However, the charge also provided, "'Knife' means any bladed instrument that is capable of inflicting serious bodily injury or death by cutting or stabbing a person with the instrument. You are instructed that a [k]nife is a deadly weapon." The State concedes that this was error because it was an incorrect statement of law. We agree.

A knife "may be shown to be a deadly weapon by showing the manner of its use, its size and shape, and its capacity to produce death or serious bodily injury," but "a knife is not a deadly weapon per se." *Hawkins v. State*, 605 S.W.2d 586, 588 (Tex. Crim. App. [Panel Op.] 1980). The State included a deadly weapon allegation in Count One of the indictment for attempted capital murder, and the State pleaded that Appellant committed the offense against Officer Feril "by stabbing him with a deadly weapon, to-wit: a knife" within its primary allegations. The offense of aggravated assault of a public servant includes a deadly weapon element. *See* PENAL § 22.02(a)(2), (b)(2). Additionally, the trial court included a deadly-weapon special issue for each count. It was error to charge the jury that a knife is a deadly weapon because that was an issue for the jury to decide. *See Alvarado v. State*, 317 S.W.3d 749, 752–53 (Tex. App.—Beaumont 2010, pet. ref'd) ("Because the knife was

admitted into evidence, the jury could determine whether the knife was capable of inflicting serious bodily injury by examining the object.").

2. The erroneous jury charge did not cause Appellant to suffer egregious harm.

Because Appellant did not object to the charge at trial, we now determine if Appellant suffered egregious harm because of this error. *See Ngo*, 175 S.W.3d at 744; *Atnipp v. State*, 517 S.W.3d 379, 395 (Tex. App.—Eastland 2017, pet. ref'd); *Alvarado*, 317 S.W.3d at 750. "Errors that result in egregious harm are those that affect 'the very basis of the case,' 'deprive the defendant of a valuable right,' or 'vitally affect a defensive theory.'" *Ngo*, 175 S.W.3d at 750 (quoting *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)); *see Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1985). "We will not reverse a conviction unless the defendant has suffered 'actual rather than theoretical harm.'" *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (quoting *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011)). To determine whether egregious harm occurred, we analyze (1) the entire jury charge, (2) the state of the evidence, (3) arguments of counsel, and (4) any other relevant information in the record. *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016).

a. Only one factor—a review of the entire jury charge—weighs in favor of finding egregious harm.

As we previously explained, the abstract paragraph of the jury charge contained a misstatement of law: "a [k]nife is a deadly weapon." The abstract portion also included the correct definition for "deadly weapon." Nothing in the application paragraphs provides any curative context. The first factor weighs in favor of finding egregious harm.

b. The other three factors—the state of the evidence, arguments of counsel, and other information in the record—weigh heavily against finding egregious harm.

The second factor regarding the state of the evidence weighs heavily against finding egregious harm. Appellant testified at trial. In response to a question from his trial counsel on direct examination about how he intended to use the knife, Appellant said, "I never wanted to stab anybody. I thought I was turning around to have like a little duel. I was bringing a knife to a gun fight." Appellant also testified that he did not intend to stab or cut Officer Feril but instead only intended to "ward him off." Although he maintained that he did not intend to actually stab Officer Feril, Appellant did not dispute that he used the knife as a weapon.

The second factor in the egregious-harm analysis "asks if the jury charge error related to a contested issue." *Hutch*, 922 S.W.2d at 173; *see Ngo v. State*, 175 S.W.3d at 751. The plain language of the statutory definition of "deadly weapon" "does not require that the actor actually intend death or serious bodily injury . . . . [T]he provision enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force." *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000). Appellant did not substantially contest the deadly weapon issue; his own testimony indicated his intent to use the knife to threaten deadly force.

Additionally, the State presented strong probative evidence that Appellant's knife was capable of causing death or a serious injury. Analyzing the state of the evidence includes a consideration of the "weight of probative evidence." *Villarreal*, 453 S.W.3d at 433; *see Allen v. State*, 253 S.W.3d 260, 267–68 (Tex. Crim. App. 2008) ("[I]n an egregious-harm analysis, it is appropriate to consider the plausibility of the evidence raising the defense, as at least one factor among others.").

The State admitted Appellant's knife, which had a three-inch blade, into evidence for the jury to evaluate. A "three-inch blade is large enough to inflict serious wounds." *Robertson v. State*, 163 S.W.3d 730, 733 (Tex. Crim. App. 2005). Officer Feril's supervisor, Sergeant Medrano, had over twenty-eight years of experience and testified that the knife would have caused death or serious bodily injury if it had struck Officer Feril in the neck or another vital area. And a witness testified about Appellant's intent to hurt Officer Feril, "if not kill him." Because the knife was admitted into evidence and witnesses testified about its characteristics and the manner in which the knife was used, the jury was in a position to evaluate it based on the correct definition of "deadly weapon" that was provided in the charge. *See id.* at 732–34. There was strong evidence that the knife was a deadly weapon, and Appellant did not substantially contest this issue. Therefore, the second factor weighs heavily against finding egregious harm.

As for the third factor, regarding the arguments of counsel, the State made both curative and harmful statements to the jury. In closing argument, for example, the prosecutor began by arguing that the knife was a deadly weapon because it was sharp and Appellant used it to assault Officer Feril. The State also made harmful, imprecise statements, repeating the error: "[Y]ou know that anything that can be used to harm someone is a deadly weapon"; "a knife is [a] deadly weapon"; and "[a] knife is inherently a deadly weapon." However, the prosecutor also stated, "Now, in this case, you still have to make that finding, so we talk about it." Although some of the prosecutor's statements straddled the line between argument and error, the prosecutor also made curative statements that alerted the jury to their ultimate responsibility to make the deadly weapon finding. *See Gelinas v. State*, 398 S.W.3d 703, 709 (Tex. Crim. App. 2013) ("Thus, though there were some misstatements of the law during jury arguments, both parties also argued the correct law very clearly to the jury. . . . [W]e believe the third factor weighs significantly in favor of a finding

of no egregious harm."). Taken as a whole, the arguments of counsel weigh slightly against egregious harm.

The fourth factor also weighs against finding egregious harm. The trial court submitted special issues to the jury for a deadly weapon finding on each count. The trial court presented the jury with the special issues on separate pages from the general jury charge. The special issues were identical to one another and provided the correct definition for "deadly weapon" in an abstract paragraph, which was juxtaposed to an application paragraph on a single page. Prior to closing arguments but after reading the instructions for the primary verdicts, the trial court read the instructions for the special issues. This context in which the special issues were presented to the jury provided a strong curative measure against the erroneous definition in the abstract portion of the primary jury charge. Therefore, this factor weighs against finding egregious harm.

In conclusion, three out of the four factors weigh against finding egregious harm. The jury charge itself contained error. However, the state of the evidence weighs heavily against egregious harm. Appellant admitted to using the knife in a manner that satisfies the definition of "deadly weapon." The arguments of counsel provided some curative statements. And the context in which the deadly weapon issue was presented to the jury—two separate findings with correct instructions, which were read aloud by the trial court—decreased the likelihood that the jury decided the issues based on the wrong legal standard. We therefore hold that Appellant did not suffer egregious harm. We overrule Appellant's third issue.

III. *This Court's Ruling*

We vacate Appellant's conviction as to the second count (aggravated assault of a public servant), and we reverse the trial court's judgment and render a judgment

of acquittal with respect to that count. With respect to the first count (attempted capital murder), we affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

February 15, 2018

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.[4]

[4]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.