AFFIRM; and Opinion Filed March 30, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00136-CR

No. 05-16-00137-CR

BENJAMIN KEVIN NEWMAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-81562-2014, 416-81563-2014

MEMORANDUM OPINION

Before Justices Fillmore, Evans, and Boatright
Opinion by Justice Boatright

A jury found appellant guilty of murder and two aggravated assaults. It sentenced him to seventy-five years' imprisonment for the murder, thirty years' imprisonment for the aggravated assaults, and a $30,000 fine. Appellant argues that the evidence is insufficient to support the convictions. He argues further that the trial court erred by admitting evidence of his request for an attorney, excluding evidence as hearsay that was offered for a valid purpose, and allowing the jury to find him guilty based on an incorrect jury charge. We affirm the trial court's judgments.

Background

Appellant became intoxicated at a bar in Plano with two friends, Christopher Brigman and Rebecca Locke. When they decided to leave, four of the bar's employees gathered around appellant's car to prevent him from driving. Appellant got in his car and backed out of his parking space anyway. As he started to pull forward, the bar's security supervisor, Arthur Johnson, stood in the way, waving for appellant to stop. Appellant's car "bumped" Johnson. Then another bar employee, Tyler Rasco, opened the car door, pushed appellant aside, and put the car in park. Appellant got out of the car and cursed at Rasco, who warned him against any physical response. Appellant got back in the car. The bar employees drew back, and appellant drove out of the parking lot with Locke in the passenger seat. Brigman stayed in the parking lot.

The four bar employees and Brigman began walking back through the parking lot toward the front door of the bar. They had walked a short distance when appellant, who had driven back into the lot, pulled up slowly behind them. Appellant then accelerated and drove into them. His car "side swiped" Johnson and Rasco as they attempted to dive out of its path. Appellant's car hit Brigman and a bar employee, William Kurfman, directly, throwing them both up into the air. Kurfman landed to the side of the car, but Brigman landed on the windshield and fell off as appellant continued to drive. Locke jumped from the moving vehicle after the windshield broke, but appellant drove away. Plano police stopped appellant's car soon afterwards and arrested him.

Brigman died. Johnson, Rasco, and Kurfman were injured. Appellant admitted at trial that he caused the incident that resulted in Brigman's death and the staff members' injuries. He admitted he was intoxicated, and he admitted his conduct was reckless. But he denied that he intended to hurt anyone. The jury found appellant guilty of the murder of Brigman and the aggravated assault of Rasco and Kurfman; he was acquitted of assaulting Johnson.

Sufficiency of the Evidence of Culpable Mental State

In his first issue, appellant argues that the evidence is insufficient to support the murder and aggravated assault convictions. He contends the State failed to prove beyond a reasonable doubt that he had the required culpable mental state for either offense. We determine whether evidence is sufficient by asking whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Johnson v. State,* 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012) (hereinafter *Johnson 2012*). We defer to the jury to resolve any conflicts in testimony and to weigh the evidence and draw reasonable inferences from it. *Isassi v. State,* 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

Aggravated Assault

To support a conviction for aggravated assault, the State was required to prove appellant intentionally, knowingly, or recklessly caused serious bodily injury to the complaining witnesses, or caused them bodily injury while using or exhibiting a deadly weapon. TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2016), § 22.02(a) (West 2011); *Reed v. State*, 117 S.W.3d 260, 262 (Tex. Crim. App. 2003). Thus, the State was required to prove appellant was at least reckless in causing the injuries. Appellant admitted that he recklessly caused the injuries of Kurfman, Rasco, and Johnson in the manner alleged by his indictment. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found appellant possessed the culpable mental state to commit aggravated assault.

Murder

To support a conviction for murder, the State was required to establish that appellant intended to cause serious bodily injury and committed an act clearly dangerous to human life that caused Brigman's death. TEX. PENAL CODE ANN. § 19.02 (West 2011). Intent is most often

proved through the circumstantial evidence surrounding a crime. *Sholars v. State,* 312 S.W.3d 694, 703 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). "[I]t is not necessary that every fact point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances." *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993) (hereinafter *Johnson 1993*). We view the evidence in the light most favorable to the prosecution. *Johnson 2012,* 364 S.W.3d at 293–94.

The evidence shows that appellant accelerated into Brigman and the bar's employees. Recently, this Court identified a number of unpublished opinions concluding that a rational jury may infer that a driver intentionally caused serious bodily injury from the driver's acceleration toward people whom he knew to be in the way. *Sixtos v. State*, No. 05-13-00502-CR, 2014 WL 4202796, at *5 (Tex. App.—Dallas Aug. 26, 2014, pet. ref'd). Appellant also drove away after he hit Brigman. Texas courts have found the requisite intent for murder when a driver kills someone with a car and drives away without stopping. *See, e.g., Samuels v. State,* 785 S.W.2d 882 (Tex. Crim. App. 1990). Thus, there is evidence appellant intended to cause serious bodily injury.

Appellant contends he was only afraid and confused after the initial confrontation and that he did not intend to hurt anyone. Appellant has not attempted to offer any evidence or explanation to support his assertion that he was afraid. A rational juror would have been free to find that people tend not to return to the scene of events that, just seconds before, had made them afraid. And appellant did not offer any evidence or explanation supporting his claim that he was confused. Instead, evidence indicates that he understood what was happening to him and that he was angry about it. For example, appellant wanted to drive away and argued with the people trying to prevent him from doing so. Then he bumped Johnson in a menacing display of

calculated violence: appellant made just enough contact to show that he was dangerous and in charge, but not enough to cause serious bodily injury. Rasco's testimony suggests that appellant wanted to fight him because Rasco had reached into appellant's car and put it in park.

In the end, appellant relies on his own testimony and on Locke's statement that he did not intend to hurt anyone. Locke was interviewed twice by the police. Immediately after the incident, she told police she did not believe appellant intended to hurt anyone; she said the group of people was "to the side" and that it appeared they were going to stay to the side as he drove past. Later, though, Locke acknowledged the people were right in front of the vehicle, and she conceded she had been trying to "help [appellant] out" when she gave her first statement. It is the jury's function to resolve any conflicts in testimony and to weigh the evidence and draw reasonable inferences from it. *Isassi,* 330 S.W.3d at 638.

We conclude that a rational trier of fact, charged with discerning appellant's intent from evidence of the surrounding circumstances, could have found beyond a reasonable doubt that he intended to cause serious bodily injury when he drove into the crowd and killed Brigman.

Admissibility of Request for Counsel

In his second issue, appellant contends the trial court erred in overruling his objection and allowing the jury to hear the portion of a State-recorded videotape in which appellant requested a lawyer. The video recorded appellant while he was being processed in the intoxilyzer room, before he went through the booking process. Appellant can be heard repeatedly requesting a lawyer.[1] We review a trial court's decision to admit evidence under the abuse of discretion standard. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). "A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Id.* Relevant evidence is admissible, but the trial court may

[1] The video does not afford an image of appellant or the officers with him during this time period.

exclude it if its probative value is substantially outweighed by a danger of unfair prejudice. TEX. RS. EVID. 402, 403.

Appellant argues the evidence in the video was highly prejudicial because the jury would likely consider it as evidence of his guilt. He relies on *Lajoie v. State*, 237 S.W.3d 345 (Tex. App.—Fort Worth 2007, no pet.), in which the court acknowledged that presenting the jury with a video showing a DWI defendant asked for an attorney "could lead to a decision on an improper basis, i.e. anyone who immediately and repeatedly asks for an attorney must be guilty." *Id.* at 353. In that case, the State argued the video was probative of the defendant's speech pattern after his arrest, but the court concluded other portions of the video presented the same evidence without implicating the defendant's request for counsel. *Id.* The court expressed concern the evidence would be given "undue weight" when the jury determined the defendant's guilt. *Id.* After performing a balancing test, the court concluded the probative value of the request for a lawyer was substantially outweighed by the danger of unfair prejudice, citing rule 403. *Id.*

In appellant's case, the prosecution argues the evidence was relevant to his "demeanor and angry state of mind" a short time after the incident. The prosecution contrasts the defendant in *Lajoie*, who was accused of driving while intoxicated, with appellant, who was charged with murder. In a murder prosecution, it argues, the State is permitted to offer "all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CRIM. PROC. CODE ANN. art. 38.36(a) (West 2005). The disputed portion of the video was necessary, the prosecution argues, to show appellant "was persistently belligerent and argumentative" as he had been when confronted at the bar.

We need not decide, however, whether this evidence was admitted erroneously because, even if it had been, the evidence did not harm appellant. We must disregard any non-constitutional error that does not affect appellant's substantial rights. TEX. R. APP. P. 44.2(b).

Here, the jury heard appellant ask for a lawyer earlier in the same video, when he was asked to give a breath or blood sample. Defense counsel did not try to suppress that portion of the video, acknowledging that "the case law does not come down in our favor on that." Appellant has not explained how his substantial rights were affected when the jury heard his request for an attorney only in the intoxilyzer room, but not when he requested an attorney while he was asked for a breath or blood sample.

Moreover, the jury heard appellant admit that he recklessly killed his friend, and committed aggravated assault against bar employees. In order for the jury to have considered his request for an attorney to be evidence of guilt, jurors would have had to understand the request to be evidence of guilt of murder only, and not manslaughter or criminally negligent homicide. In the unlikely event that this was what jurors understood, they would have had to think appellant was able, first, to distinguish one crime from two related crimes and, second, to make a rational decision based on his conception of that distinction. Among other things, this somewhat sophisticated exercise in reasoning would be highly probative of whether appellant was able to form an intent to commit the horribly simple act of driving into people. Again, though, the possibility that the jury considered appellant's request for an attorney to be evidence that he was guilty of murder is exceedingly remote. Appellant does not explain how jurors could have done so. There is no evidence that they did. And the trial court instructed the jurors not to consider the evidence "for any purpose towards the guilt of the accused."[2] In the absence of evidence to

[2] The court's instruction stated in its entirety:

> Ladies and gentlemen, there are portions of this video where a reference is made regarding an attorney or a request for an attorney. Those statements are not to be considered for any purpose towards the guilt of the accused. They're simply to be considered in the totality of the video that's being offered, for any purpose you consider, other than the guilt of the accused.

Although appellant argued during submission that the instruction was too general to give the jury guidance, he did not object to the instruction when it was proposed outside the presence of the jury or when it was actually given to the jury.

the contrary, we presume the jury followed the court's instructions as given. *Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002).

We conclude any error in admitting appellant's request for an attorney did not affect his substantial rights. Accordingly, we overrule appellant's second issue.

Derivative Hearsay

In his third issue, appellant argues the judge erroneously sustained the prosecution's objection to this question, asked during cross-examination of the detective assigned to the case:

> Q: And in your interview with defendant, what he told you that night about what happened that night, that was inconsistent with the incident being intentional. Would you agree with me on that?

The prosecution argued that this called for a response based on hearsay. The court sustained, saying, "It's derivative hearsay." Appellant argues that the question was not asked to ascertain the truth of the matter asserted, but to explain how the investigation was proceeding. We review the trial court's evidentiary rulings for an abuse of discretion. *McDonald*, 179 S.W.3d at 576. A Trial court abuses its discretion by being so clearly wrong that the ruling is outside the zone of reasonable disagreement. *Id* at 575.

Hearsay is a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). The question at issue here did not ask the detective about how the case was proceeding. It asked the detective to agree that appellant's out-of-court statement showed that appellant did not intend to do what he did. The theory of appellant's case was that he did not intend to do what he did. Thus, the question appears to have been an attempt to use an out-of-court statement to prove that appellant truly did not intend to do what he did.

Appellant does not offer any evidence or explanation to support his claim that the question was about how the investigation was proceeding. Instead, he contends that the question

is indistinguishable from one that was found not to be hearsay in *Head v. State*, 4 S.W.3d 258 (Tex. Crim. App. 1999). The question at issue in *Head* asked whether three different out-of-court statements were consistent with one another, *id*. at 262–63, but the question at issue here asked whether one out-of-court statement was consistent with a particular conclusion. The question in *Head* is categorically different from the question at issue in this case.

The trial court did not abuse its discretion in sustaining the prosecution's hearsay objection. We overrule appellant's third issue.

Jury Charge Error

Appellant was indicted for murder for acting with "intent," but the jury charge at appellant's trial contained the definition of the word "knowingly," which is a lower culpable mental state than "intentionally." Appellant argues in his fourth issue that this was egregious error.

Appellate resolution of a jury-charge issue involves two steps. First, we determine whether error exists. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If error does exist, we determine whether the error caused sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). When, as in this case, the error was not objected to, we will reverse only if the error created harm so egregious that the defendant was denied a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Egregious harm deprives the defendant of a valuable right or vitally affects a defensive theory. *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

Because appellant's indictment alleged only the intentional mental state, the trial court erred by including the surplus definition of a knowing mental state. *See Ash v. State*, 930 S.W.2d 192, 194 (Tex. App.—Dallas 1996, no pet.) ("The jury charge should contain only that portion of the statutory definition corresponding to the culpable mental state proscribed by the offense.").

To determine whether the charge error caused egregious harm, we examine the entire jury charge, the state of the evidence, the argument of counsel, and any other relevant information in the record. *Almanza*, 686 S.W.2d at 171.

Reviewing the charge as a whole, we begin with the definition of murder itself, which, in this jury charge, was properly limited to intentional conduct:

> Our law provides that a person commits the offense of murder if the person *intends to cause serious bodily injury* and commits an act clearly dangerous to human life that causes the death of an individual.

(Emphasis added.) The charge then correctly defines intentionally—and knowingly—with respect to the result of the conduct at issue. Finally, the application paragraph applies the requirement of intentional conduct to the facts of the case:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 17th day of April, 2014, in Collin County, Texas, the defendant, BENJAMIN KEVIN NEWMAN did then and there *with intent to cause serious bodily injury to an individual*, commit an act clearly dangerous to human life that caused the death of Christopher Brigman, by driving a motor vehicle into a group of individuals, then you will find the defendant guilty as charged.

(Emphasis added.) The application paragraph explains to the jury, in concrete terms, how to apply the law to the facts of the case. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013). Thus, it is the application paragraph that tells us whether the trial court instructed the jury in accordance with the indictment. *Id.* In this case, the application paragraph pointed jurors toward the correct mental state. The charge as a whole does not support appellant's claim of egregious harm.

We next consider the error in terms of the state of the evidence, "including the contested issues and weight of the probative evidence." *Almanza*, 686 S.W.2d at 171. We have reviewed the entire record and have specifically concluded the evidence is sufficient to support the jury's finding that appellant acted with the intention of causing serious bodily injury to the individuals

he struck with his car. Thus, the state of the evidence does not support a claim of egregious harm.

Almanza's third factor is the argument of counsel. Our review of the arguments in this case persuades us that the prosecutor (indeed, counsel for both parties) correctly limited arguments to the issue of whether appellant acted intentionally. The State made repeated references to "action that was done intentionally," and to circumstances that "point[] to a deliberate, intentional act." For example, early in its closing argument the prosecutor stated:

> Nothing about what [appellant] did that night was an accident, nothing he did that night was reckless, and nothing he did that night was criminally negligent. Everything he did was deliberate, it was purposeful, and most importantly, it was intentional. What he did was an intentional act, and he needs to be held accountable for what he did that night.

This remark specifically ruled out the two mental states attached to the lesser included homicide offenses contained in the charge and stressed the intentional nature of what appellant did. The prosecutor made no mention of the knowing mental state; the existence of the surplus definition was never a part of the State's argument. We conclude counsel's argument does not support the claim of egregious harm.

And finally, *Almanza* instructs us to consider any other relevant information in the record. In this regard we consider that the jury was given, in the same charge, instructions on the lesser included offenses of manslaughter (which requires recklessness) and criminally negligent homicide (which requires negligence). If jurors had failed to find intentional conduct and wished to "settle" for a lesser mens rea, as appellant suggests, they could have found appellant guilty of manslaughter, the elements of which appellant admitted to from the witness stand. This presence of an alternative offense and mental state argues against appellant's claim for egregious harm.

In light of all the *Almanza* factors, we do not conclude appellant suffered egregious harm from the inclusion of a definition of "knowingly" in the murder charge. We overrule appellant's fourth issue.

Conclusion

We have decided each of appellant's issues against him. Accordingly, we affirm the trial court's judgments.

/Jason Boatright/
JASON E. BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BENJAMIN KEVIN NEWMAN, Appellant	On Appeal from the 416th Judicial District Court, Collin County, Texas
No. 05-16-00136-CR V.	Trial Court Cause No. 416-81562-2014.
	Opinion delivered by Justice Boatright.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 30th day of March, 2017.

Court of Appeals
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