Affirmed and Opinion Filed March 19, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00067-CR

DARIUS FRANCHOT MADDEN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 422nd Judicial District Court
Kaufman County, Texas
Trial Court Cause No. 15-90218-422-F

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

A jury convicted appellant of burglary of a habitation, found an enhancement paragraph true, and sentenced him to life imprisonment. Appellant's sole issue argues that the trial court erred by denying his requested jury charge modification, which appellant requested because the charge included an instruction that the jury was to decide appellant's guilt or innocence. According to appellant, that singular instruction shifted the burden of proof and required him to prove his "actual innocence." However, on this record with this charge, evidence and arguments, we conclude that appellant did not suffer harm even if the charge was erroneous. We thus affirm the trial court's judgment.

I. BACKGROUND

In June 2015, appellant's brother Ray drove appellant and Larry Ranson to Cody Klee's house to rob him. Ranson and appellant assaulted, tied up, and gagged Klee before stealing various items from his home safe.

A suspicious neighbor called the police, and Ray was detained as he waited in the getaway car. Ranson and appellant exited the back of the house and were caught by the police moments later in a Chicken Express parking lot.

Ranson confessed that day and identified appellant and his brother. The next day, appellant gave the police a statement saying that he participated in the burglary as the lookout.

Appellant's burglary of a habitation charge was tried to a jury. Although the charge in other places instructed the jury that the state had to prove that appellant was guilty and that the law did not require appellant to prove his innocence, its final instruction said:

> (M) Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this case, and you must restrict your deliberations solely to the issue of guilt or innocence of the defendant.

The jury found appellant guilty and, after finding an enhancement paragraph true, assessed punishment at life imprisonment.

II. ANALYSIS

A. Parties' Contentions

Appellant's sole issue argues that the trial court erred by overruling his objection and denying his requested modification to the jury charge. Specifically, the charge included part of an old pattern jury instruction stating, "Your sole duty is to determine the guilt or innocence of the defendant under the indictment in this case, and you must restrict your deliberations solely to the issue of guilt or innocence of the defendant." Appellant requested that the reference to guilt or innocence be changed to "guilty or not guilty," and the trial court denied the request. Appellant maintains this erroneous instruction shifted the burden of proof and caused him harm.

The State responds that the charge tracked the code of criminal procedure language requiring that cases tried to a jury first submit the issue of guilt or innocence. *See* TEX. CODE CRIM. PROC. art. 37.07§ 2(a). But we need not consider whether the charge was erroneous because even if it was, appellant was not harmed.

B. Standard of Review

Charge error, if timely objected to, requires reversal if the error was "calculated to injure the rights of [the] defendant," which means no more than that there must be some harm to the accused from the error. TEX. CODE CRIM. PROC. ANN. art. 36.19; *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). This analysis requires us to consider (i) the charge as a whole, (ii) counsel's arguments, (iii) the entirety of the evidence, and (iv) other relevant factors present in the record. *Reeves*, 420 S.W.3d at 816.

C. Application to Record

We first consider the charge as a whole. The jury was instructed to find appellant guilty of burglary of a habitation if it found beyond a reasonable doubt that appellant entered Klee's house without his consent and attempted to commit or committed robbery. The jury was further instructed that "unless you find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty."

The charge also instructed the jury on the proper burden of proof and the presumption of innocence:

> The prosecution has the burden of proving the defendant guilty. It must do so by proving each and every element of the offense charged beyond a reasonable doubt, and, if it fails to do so, you must acquit the defendant . . .
>
> The law does not require a defendant to prove his innocence. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt . . . .

Notwithstanding the above, appellant urges that additionally instructing the jury to determine his "guilt or innocence" required the jury to find that he was "actually innocent," which is at odds with the presumption of innocence. The charge, however, did not refer to "actual innocence," and instructed the jury that the presumption of innocence alone was sufficient for acquittal. The charge also instructed the jury on the burden of proof. These instructions mitigated any defect in the challenged instruction.

Thus, viewing the complained-of language in the context of the charge as a whole weighs against a finding of harm.

Next we consider the counsel's arguments. Neither the State nor the defense argued that appellant was required to prove his innocence. In fact, defense counsel reminded the jury that the State had the burden of proof, and implored them to "Read this charge and make sure that you hold the government to their burden of proof. And if they have not answered [open questions] for you, to exclude all reasonable doubt . . . you have no choice but to acquit my client." Thus, nothing in the counsels' arguments supports finding harm.

The third factor, the entirety of the evidence, also militates against finding harm. Appellant and Ranson were caught with the bag of stolen items minutes after the burglary. Ranson confessed and implicated appellant. Moreover, appellant admitted to acting as the lookout for the burglary, making him guilty as a party.[1] Thus, the evidence against appellant was strong and weighs against harm.

Finally, we consider other relevant factors. In addition to the jury instructions, there were several occasions when the judge instructed the jury on the State's burden of proof. For example, the jury was informed during voir dire that they would decide whether appellant was "guilty or not guilty," and their job would be to determine whether "[appellant] committed the act of which he

[1] The jury was charged on the law of parties.

is accused." The court also told the venire that the State had the burden to prove guilt beyond a reasonable doubt, the defendant did not have to prove his innocence, and the defendant is presumed innocent.

During the State's questioning, the prosecutor repeatedly told the venire that the State had to prove the offense's elements beyond a reasonable doubt and appellant was presumed innocent. Defense counsel also discussed the presumption of innocence and the State's burden of proof. After the jury was selected, the court repeated, "The defendant is never required to prove his innocence."

Later, during closing argument, when ruling on an objection to the State's argument about DNA, the judge instructed the jury:

> Ladies and Gentlemen, as you have been instructed, the defendant never has to prove its innocence. The burden of proof is always on the State of Texas to prove each and every element of the offense beyond a reasonable doubt. You will be guided by this instruction.

After overruling appellant's objection, the court again stated, "The defendant never has the burden of proving his innocence."

Weighing all of the foregoing, we conclude that the complained-of instruction did not cause appellant harm and overrule his sole issue.

III. CONCLUSION

Having resolved appellant's sole issue against him, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
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JUDGMENT

DARIUS FRANCHOT MADDEN,
Appellant

No. 05-17-00067-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 422nd Judicial District Court, Kaufman County, Texas
Trial Court Cause No. 15-90218-422-F.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

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

Judgment entered March 19, 2018.