AFFIRMED and Opinion Filed August 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00438-CR

DONALD RAMEL JAMES WHITE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1722670-V

MEMORANDUM OPINION
Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

Appellant, Donald Ramel James White, was convicted of attempted capital murder of a peace officer and sentenced to ninety years' imprisonment. On appeal, appellant raises five issues challenging the sufficiency of the evidence to support his conviction and the correctness of the jury charge. We affirm.

Background

Thinh Nguyen is a Farmers Branch police officer assigned to the bike team, a division of the police department which emphasizes a lot of community service and community policing. The uniform for the bike team, which is also the department's

"summer uniform," has shorts, a patch that says "Farmer's Branch Police," and a belt which carries items such as his gun, magazines, a handcuff case, tazer, and radio. It is Nguyen's preference to wear this uniform as opposed to the more formal, standard police uniform.

Nguyen also serves as a "courtesy officer" at the Prairie Crossing Apartment complex on Sigma Road in Farmers Branch. A courtesy officer is a police officer who, in exchange for reduced rent, works at the apartment complex while off-duty to protect the community, respond to disturbances, and enforce the law. The Farmers Branch police department permits officers to hold these types of part-time off duty jobs with the approval of the chief of that department. Nguyen sought and obtained such approval, which allowed him to work either in uniform or out of uniform. The jury heard testimony that an officer who is working their off-duty part time employment has the authority to act as a police officer and is directed to "[t]ake appropriate action to deal with any violation of law or breach of the peace that comes to their attention."

On days that Nguyen worked as a police officer, he would first do a quick check of the apartment complex, usually between 5:30 a.m. and 6:30 a.m., while in uniform. During several of those morning patrols in 2017, Nguyen saw appellant in the kitchen area of the apartment clubhouse. During their first encounter, Nguyen asked appellant if he lived in the complex and appellant "nodded yeah." Nguyen

asked if appellant was going to work; appellant said "yes" and told Nguyen that he worked at Tuesday Morning.

Nguyen encountered appellant in the same way on four or five additional occasions. Nguyen described their interactions, which were always in the clubhouse of the apartment complex, as "short and brief," but friendly and cordial. Nguyen was always in uniform during these encounters.

One day, one of the leasing agents at the complex told Nguyen that a homeless man, whom she described as a "tall black male with dreadlocks," had been in the kitchen area of the complex. When she asked him if he lived in the complex he ran off. Nguyen believed he recognized appellant from this description. Nguyen testified that, if he saw appellant again, he planned to ask him if he was a resident and, if he was not, ask him to leave the premises.

On October 20, 2017, Nguyen worked a city event in his capacity as a Farmers Branch police officer. He got off duty about 10:30 p.m. and, when he got home, went straight to bed. Around 2:00 a.m., he was awakened by "loud noises down at the pool." He got up, grabbed a flashlight, and, wearing only an orange shirt and cream colored shorts, went down to investigate. He did not take his gun with him.

When Nguyen got downstairs, the noise was no longer audible. He saw a female sitting in the pool texting on her phone. While the pool area closed at midnight and Nguyen had the authority to ask her to leave, he just asked her about the noise and told her to "keep it down."

Nguyen decided to check the clubhouse "just to make sure that … nothing ha[d] been broken into." When Nguyen went into the clubhouse, he saw appellant sitting in the computer room. Nguyen asked appellant if he lived there and appellant said that he did. Nguyen asked appellant if he could prove it by giving him some identification or an apartment number. Appellant responded by calling Nguyen a racist. Nguyen told appellant, "I'm a courtesy officer and I'm also a police officer of Farmers Branch."

Appellant got up "like he was leaving." Appellant did not speak, but, as he was gathering his things, Nguyen saw something in appellant's right hand. Appellant then attacked Nguyen and stabbed him on the right side of his neck with a knife.

During the course of the ensuing struggle, appellant grabbed Nguyen, spun him around, and caused him to fall to the ground. Appellant then got on top of Nguyen, straddled him, and started choking him while the knife was still in his neck. Nguyen feared he was going to die and felt if he did not do something appellant would kill him. He told appellant to stop and started screaming for help. While it was hard for him to get words out, he told appellant: "Bro, I cared about you. I was even going to give you some money when you left here." All appellant said in return was "Shhh" and "Be quiet." Nguyen testified that appellant looked at him with "dead-set eyes."

Nguyen felt himself getting weak and tired. He looked around, saw a knife on the floor, grabbed it and slashed at appellant. He missed the first time, but made

contact the second time, which caused appellant to flinch long enough for Nguyen to "back-peddle" away from appellant; he lost one of his shoes in the process. Appellant chased Nguyen in an attempt to continue the assault and the two continued to struggle in the clubhouse. Nguyen eventually made it outside, but appellant continued to pursue and attack him.

Nguyen saw the knife on the ground, but was unable to reach it. As he continued to struggle with appellant, Nguyen saw two women at the pool and screamed for help. He described his efforts to obtain help and the culmination of the attack as follows:

> And I see two girls at the pool, and I say, "Come kick the knife. He's going to stab me again." And then I just see them scoot away. I start thinking, oh, my God, they're not going to jump in and help.
>
> And then I heard a voice above say, "The police are on their way." And I didn't hear any sirens. And I was bleeding and . . . I looked at him and I said, I said, "Bro, you got me good. I'm bleeding here. You know, just kick the knife and run."
>
> And all he said was, "Let me go."
>
> And I said, "No. If I let you go, you're going to stab me again."
>
> He slammed me a couple times and eventually he was able to break free and run.

Nguyen was able to get up; he looked and saw a fellow Farmers Branch police officer out in the street. Nguyen screamed at him, then jumped over the patio fence and a gate in an effort to get to the officer. Breathing heavily, he collapsed in the street and went into shock.

Officers who found Nguyen testified that that he was frantic, breathing heavily, in pain, covered in blood, and in shock. They attempted first aid. The officers noticed signs of a struggle in the clubhouse: a chair was knocked over, there was blood on the ground, and one of Nguyen's shoes was in the room. There was a blood trail leading from the clubhouse to the pool area, where there was a large amount of blood. Phillip Foxall, a lieutenant with the Farmers Branch police who surveyed the scene, testified it was clear to him that a violent encounter had taken place and that Nguyen, during this encounter, had been fighting for his life.

Appellant, who initially evaded capture after fleeing, was spotted and arrested by the Irving Police Department just after 11:00 p.m. that same day. Subsequent DNA analysis of blood stains on appellant's socks and backpack were consistent with Nguyen's blood. Nguyen picked appellant's photograph out of a photo lineup.

While appellant was in jail awaiting trial, he called his brother; the call was recorded. On the call, appellant admitted attacking Nguyen and described the assault, including stabbing Nguyen in the neck. During this call, appellant told his brother that he knew Nguyen was a "real" police officer even though he was working as a courtesy officer, saying, "I knew he was a cop;" "I seen him before;" and "I seen him in uniform." Appellant repeatedly told his brother that he was trying to "take out" Nguyen.

Nguyen suffered scratches and bruises on his neck, which were common injuries to a person who had been strangled. He had abrasions about his upper torso,

a "deep" stab wound in his neck on the right side just below his ear, and another wound on his left bicep. He testified that he had been diagnosed with PTSD after the attack and sought counseling. He had to be cleared by a psychologist before he was allowed to return to his duties as a police officer.

Sufficiency of the Evidence

In two issues, appellant challenges the sufficiency of the evidence to support his conviction. When we consider the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant committed the offenses of attempted capital murder.

Standard of Review

A challenge to the sufficiency of the evidence is evaluated under the standards established in *Jackson v. Virginia* 443 U.S. 307, 316 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We review the evidence in the light most favorable to the verdict and determine whether a rational jury could have found all the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 894–95. This standard of review for legal sufficiency is the same for both direct and circumstantial evidence. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Burden v. State*, 55 S.W.3d 608, 613 (Tex. Crim. App. 2001). Circumstantial evidence is considered as probative as direct evidence and is sufficient, standing

alone, to establish a defendant's guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

We defer to the trier of fact's resolution of any conflicting inferences that are raised in the evidence and presume that the trier of fact, in this case the jury, resolved such conflicts in favor of the prosecution. *Jackson*, 443 U.S. at 318; *Brooks*, 323 S.W.3d at 894; *Sennett v. State*, 406 S.W.3d 661, 666 (Tex. App.—Eastland 2013, no pet.). We will uphold the verdict unless a rational factfinder must have had reasonable doubt with respect to any essential element of the offense. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899. The State need not disprove all reasonable alternative hypotheses that are inconsistent with appellant's guilt. *Wise*, 364 S.W.3d at 903. Rather, we consider only whether the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict. *Hooper*, 214 S.W.3d at 13.

Attempted Capital Murder of a Peace Officer

Appellant was indicted for attempted capital murder of a peace officer:

> That . . . (appellant) . . . did unlawfully then and there, with the specific intent to commit the offense of capital murder, do an act, to-wit: intentionally and knowingly attempt to cause the death of THINH NGUYEN, an individual, hereinafter called complainant, by STABBING AND BY CUTTING COMPLAINANT WITH A KNIFE, A DEADLY WEAPON, AND WITH A SHARP OBJECT, A DEADLY WEAPON, AND BY CHOKING AND BY STRANGLING COMPLAINANT, and the said complainant was a peace officer, namely: a City of FARMERS BRANCH police officer then and there acting in the lawful discharge of an official duty, and the said defendant then and there knew the said complainant to be a peace officer; said act

amounting to more than mere preparation that tended but failed to effect the commission of the offense intended.

A person commits the offense of criminal attempt if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. TEX. PENAL CODE ANN. § 15.01(a). A person commits capital murder of a peace officer if he intentionally or knowingly causes the death of a peace officer who is acting in the lawful discharge of an official duty and who the person knows is a peace officer. *Id*. §§ 19.02(b)(1), 19.03(a)(1). A police officer is a peace officer. *Id*. § 1.07(a)(36); TEX. CODE CRIM. PROC. ANN. art. 2.12(3).

Knowledge that Nguyen was a Peace Officer

In his first issue, appellant claims the evidence is insufficient to prove that he knew Nguyen was a peace officer at the time of the attack. He focuses on evidence which showed all of his previous encounters with Nguyen had been very brief and Nguyen was not wearing his police uniform at the time of the attack. The State responds that appellant had previously seen Nguyen in his uniform, Nguyen identified himself as a police officer before appellant attacked, and, in a jail call to his brother, appellant admitted he knew Nguyen was a police officer.

The evidence established that Nguyen was in his Farmers Branch police "bike team" uniform during all of his previous encounters with appellant, however brief those encounters may have been. During the encounter immediately prior to the

attack, when appellant called Nguyen a racist, Nguyen told him "I'm a courtesy officer and I'm also a police officer of Farmers Branch." And on the jail call with his brother appellant stated that he knew Nguyen, whom he was trying to "take out," was a "real" police officer, a "courtesy officer," and/or a "cop." Appellant, who neither testified nor presented any defensive evidence, offered nothing to dispute this evidence.

The jury, as the fact-finder in this case, was the sole judge of the weight and credibility of the evidence and witness testimony. *See* CRIM. PROC. art. 38.04; *Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008). From Nguyen's testimony, a rational jury could have found beyond a reasonable doubt that appellant had seen Nguyen in uniform, knew he was a police officer, and that Nguyen had identified himself as a police officer right before appellant attacked him. Based on that evidence, a rational jury could have found beyond a reasonable doubt that appellant knew Nguyen was a peace officer when he attacked him. We overrule appellant's first issue.

An Act that Tended to Result in Death

In his second issue, appellant claims that, because there was no proof of the seriousness of Nguyen's injuries, there was insufficient evidence he committed an act that tended, but failed to, result in Nguyen's death. Appellant argues that because Nguyen testified he suffered only bodily injury, *i.e.*, pain and impairment of his physical condition, and because no medical evidence established that Nguyen

suffered a mortal wound or serious bodily injury, the State failed to prove that appellant's actions tended to be severe enough to cause death. Appellant also claims that Nguyen's fear of death was insufficient. The State responds that it is not the nature of the injuries inflicted or suffered, but whether appellant acted with specific intent to kill and did an act amounting to more than mere preparation that tended but failed to effect Nguyen's death. Specifically, the State argues that appellant's intent to kill is shown by his actions of stabbing and choking Nguyen, particularly stabbing him in the neck, an especially vulnerable part of the body, which amounted to more than mere preparation that tended but failed to effect the commission of capital murder.

Allegations of Attempted Murder

As stated above, the indictment alleged, in pertinent part, that appellant attempted to cause Nguyen's death by "stabbing and by cutting" Nguyen with a knife and a sharp object and "by choking and by strangling" Nguyen. The application paragraph of the jury charge for attempted capital murder tracked the indictment, though it omitted the allegation of strangling:

> Now, if you find from the evidence beyond a reasonable doubt that on or about October 21, 2017, in Dallas County, Texas, the defendant Donald Ramel James White, with the specific intent to commit the offense of capital murder of Thinh Nguyen, a peace officer, hereinafter called complainant, *did an act, to-wit: stab, cut or choke the complainant with a knife, a sharp object, or hands,* deadly weapons, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended, then you will find the

> defendant guilty of Attempted Capital Murder as charged in the indictment.

(emphasis added). The State was required to prove that appellant's intent, when he stabbed, cut, and/or choked Nguyen, was to cause Nguyen's death and that those acts amounted to more than mere preparation which tended, but failed, to effect the commission of the offense intended, *i.e.*, Nguyen's death.

Specific Intent to Kill

The Penal Code provides that an individual commits the offense of murder in one of two ways: (1) by intentionally or knowingly causing the death of an individual; or, alternatively, (2) by intending to cause serious bodily injury and committing an act clearly dangerous to human life. PENAL § 19.02(b)(1), (2). The Penal Code further provides that a person commits the offense of criminal attempt "if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *Id*. § 15.01(a).

For the offense of criminal attempt, either attempted capital murder or attempted murder, the State must prove that the defendant had the specific intent to kill his intended victim. *See Flanagan v. State*, 675 S.W.2d 734, 741 (Tex. Crim. App. 1984) (op. on reh'g); *see also Robbins v. State*, 145 S.W.3d 306, 309 (Tex. App.—El Paso 2004, pet. ref'd); *Flores v. State*, No. 08-18-00065-CR, 2019 WL 7288736, at *3 (Tex. App.—El Paso Dec. 30, 2019, no pet.) (mem. op., not

designated for publication); *Anderson v. State*, No. 05-13-00253-CR, 2013 WL 6870013, at *3 (Tex. App.—Dallas Dec. 31, 2013, no pet.) (mem. op., not designated for publication). A conviction for attempted murder or attempted capital murder cannot be based on allegations or proof that a defendant acted with only an intent to cause serious bodily injury. *Flanagan*, 675 S.W.2d at 741 (holding that specific intent to kill is a necessary element of attempted murder); *Tubbs v. State*, 57 S.W.3d 519, 522–23 (Tex. App.—Waco 2001, pet. ref'd) (holding that attempted murder can only be committed by a person who has "the specific intent to commit or complete the offense of murder, *i.e.* has the intent to kill"); *Flores,* 2019 WL 7288736, at *3 (holding that a conviction for attempted murder or attempted capital murder cannot be based on a defendant acting with only an intent to cause serious bodily injury as that would amount to aggravated assault). Further, attempted capital murder does not require proof that serious bodily injury was actually inflicted. *Ex Parte Carle*, 369 S.W.3d 879, 880 (Tex. Crim. App. 2012) (Keller, P.J., dissenting). As the Court of Criminal Appeals has held, the "harm, or lack of it, to the victim is not an element of the offense of attempted murder and, therefore, need not be proven at trial." *Yalch v. State*, 743 S.W.2d 231, 233 (Tex. Crim. App. 1988); *see also Moreno v. State*, 755 S.W.2d 866, 869 (Tex. Crim. App. 1988) (noting that a lack of physical harm does not negate intent to kill a peace officer and stating "[i]t would be a dismal day for victims when this Court required actual harm to occur before a defendant's murderous intent could be inferred").

Appellant does not dispute that he acted with the specific intent to kill when he attacked Nguyen. Rather, his argument focuses solely on the extent of Nguyen's injuries which he claims were not sufficient to establish that Nguyen suffered serious bodily injury. Because proof of serious bodily injury is not required for attempted capital murder, this argument fails in its entirety.

The State was required to show that, at the time appellant attacked Nguyen, he had the intent to kill Nguyen. Whether the defendant had the intent to kill is a question of fact for the jury to determine. *Brown v. State*, 122 S.W.3d 794, 800 (Tex. Crim. App. 2003); *Hall v. State*, 418 S.W.2d 810, 812 (Tex. Crim. App. 1967); *Robbins*, 145 S.W.3d at 309. A jury may infer the intent to kill from the defendant's acts, words, or conduct. *Guevara*, 152 S.W.3d at 50 (holding intent may be inferred from circumstantial evidence such as acts, words, and conduct of the accused); *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) (same).

Intent to kill may also be inferred from the defendant's use of a deadly weapon. *Brown*, 122 S.W.3d at 800; *Robbins*, 145 S.W.3d at 309. While neither a knife or a person's hands are deadly weapons per se, either or both can qualify as a deadly weapon by demonstrating that the manner of its use or intended use is capable of causing death or serious bodily injury. PENAL § 1.07(a)(17)(B). A knife can be a deadly weapon by the manner of its use. *See, e.g.*, *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (holding that the mere carrying of a butcher knife during a violent attack was legally sufficient for a factfinder to conclude that the "intended

use" for that knife was that it be capable of causing death or serious bodily injury); *Morales v. State*, 633 S.W.2d 866, 868 (Tex. Crim. App. 1982) (stating that while a knife is not a deadly weapon per se, it can be shown to be a deadly weapon through proof of the manner of its use, its size and shape, and its capacity to cause serious bodily injury); *Ex Parte Carle*, 369 S.W.3d at 880 n. 1 (Keller, P.J., dissenting) (stating that allegations of cutting or stabbing with a knife implicitly allege bodily injury). Hands can also be deadly weapons when they are used to choke another person. *See, e.g.*, *Harris v. State*, 164 S.W.3d 775, 784-85 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding that attempts to choke a victim by using a "choke hold" are sufficient to show bodily injury); *Silva v. State*, No. 07-05-0423-CR, 2006 WL 1788985, at *2 (Tex. App.—Amarillo June 29, 2006, pet. ref'd) (mem. op., not designated for publication) (holding that a defendant's action of choking the complainant with one hand, coupled with her belief that he was trying to kill her and the nature of his assault on her, allowed the factfinder to infer intent to kill); *Townsend v. State*, No. 12-05-00090-CR, 2006 WL 2106990, at *4 (Tex. App.—Tyler July 31, 2006, pet. ref'd) (mem. op., not designated for publication) (evidence that hands were used to choke or strangle someone is sufficient to support a finding that the hands were deadly weapons).

In this case there was ample evidence from which a rational jury could find that appellant had the intent to kill Nguyen. Appellant attacked Nguyen with a knife, stabbing him in the neck and arm. Appellant tried to choke Nguyen while the knife

was still in his neck. When Nguyen broke away, appellant chased him and attacked him again, before running away. In a jail phone call to his brother, appellant admitted that he was "trying to take him out." The jury could rationally conclude from appellant's acts, words, and conduct that he intended to kill Nguyen.

Acts Amounting to More than Mere Preparation

To prove that an act tends to effect the commission of the attempted offense, the State must show that the act could have caused death but failed to do so. *Flanagan*, 675 S.W.2d at 741; *Weeks v. State*, 834 S.W.2d 559, 561 (Tex. App.—Eastland 1992, pet. ref'd). Here, the same acts that show appellant's intent to kill Nguyen, *i.e.*, stabbing, cutting and choking Nguyen during the course of a prolonged attack, go beyond mere preparation. Appellant's actions could have caused Nguyen's death. *See Morales*, 633 S.W.2d at 868 (stating it is "common knowledge that the throat is a particularly vulnerable part of the body, as exemplified by the popular expression 'go for the throat'" and holding that slashing the victim in the throat, which left a gash from earlobe to the corner of the mouth was evidence from which a jury could infer that the knife used was a deadly weapon); *Hart v. State*, 581 S.W.2d 675, 678 (Tex. Crim. App. 1979) (stating that the physical act of thrusting a knife blade into a victim's body goes beyond mere preparation). And responding officers to the scene of the attack found evidence of a bloody, violent encounter leading at least one officer to conclude that Nguyen was fighting for his life.

A rational jury could conclude that, because appellant "went for the throat" when he stabbed and choked Nguyen, he could have killed him. A rational jury could have further found beyond a reasonable doubt that appellant did an act that tended, but ultimately failed, to effect the commission of murder of a peace officer, which is capital murder. We overrule appellant's second issue.

Jury Charge

In his third, fourth, and fifth issues, appellant claims he suffered egregious harm from error in the trial court's jury charge. Specifically, appellant claims that (1) the charge failed to define "specific intent to kill" and to limit the definition of the culpable mental state of "knowingly" to the relevant conduct elements of the underlying offense; (2) the abstract portion of the charge failed to tailor the definition of "knowingly" to the aggravating element of attempted capital murder, *i.e.*, that appellant knew Nguyen was a peace officer; and (3) the charge omitted an element of the offense from the application paragraph, *i.e.*, that appellant knew Nguyen was a peace officer.

The State responds that (1) a definition of "specific intent to kill" was unnecessary in the abstract portion of the charge; (2) the trial court correctly omitted a definition of "knowingly" with respect to the circumstances surrounding the offense from the abstract portion of the jury charge; and (3) knowledge that the intended victim is a peace officer is not an element of criminal attempt.

Standard of Review

When evaluating alleged jury charge error, we must first determine whether the charge was erroneous. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). If we find error and appellant objected to that error at trial, then only "some harm" is necessary to reverse the trial court's judgment. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Where, as here, a defendant did not object to the charge, he is entitled to a reversal only if he suffered "egregious harm" as a result of the error. *Id.*; *see also* CRIM. PROC. art. 36.19; *Ngo*, 175 S.W.3d at 743–44. Egregious harm is the type and degree of harm that affects the very basis of the case, deprives the defendant of a valuable right, or "vitally affects a defensive theory." *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). In making an egregious harm determination, the actual degree of harm must be assessed "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information reflected in the record of the trial as a whole." *Trejo v. State*, 280 S.W.3d 258, 261 (Tex. Crim. App. 2009) (quoting *Almanza*, 686 S.W.2d at 171). Review should not be limited to parts of the charge standing alone. *Salahud-din v. State*, 206 S.W.3d 203, 210 (Tex. App.—Corpus Christi 2006, pet. ref'd).

Specific Instructions

In the abstract portion of the jury charge, the trial court gave the following definitions of attempted capital murder, capital murder and murder:

> A person commits the offense of Attempted Capital Murder if, *with specific intent to commit capital murder*, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.
>
> A person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual who is a peace officer who is acting in the lawful discharge of an official duty and who the person knows is a peace officer.
>
> A person commits murder when he intentionally or knowingly causes the death of an individual.

(emphasis added). These definitions are in keeping with the Penal Code. PENAL §§ 15.01(a); 19.02(b)(1); 19.03(a)(1). The charge defined peace officer as "a police officer of an incorporated city, town, or village." *Id*. § 1.07(a)(36); CRIM. PROC. art. 2.12(3).

The trial court also defined two culpable mental states, *i.e.*, intentionally and knowingly, in the abstract portion of the charge:

> A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> 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.

PENAL 6.03(a), (b).

The application paragraph of the charge, which permitted the jury to convict appellant for attempted capital murder, required a finding that Nguyen was a peace officer:

> Now, if you find from the evidence beyond a reasonable doubt that on or about October 21, 2017, in Dallas County, Texas, the defendant Donald Ramel James White, *with the specific intent to commit the offense of capital murder* of Thinh Nguyen, a peace officer, hereinafter called complainant, did an act, to-wit: stab, cut or choke the complainant with a knife, a sharp object, or hands, deadly weapons, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended, then you will find the defendant guilty of Attempted Capital Murder as charged in the indictment.
>
> If you do not so believe or you have a reasonable doubt thereof, you will next consider whether the defendant is guilty of the lesser included offense of Attempted Murder.

(emphasis added).

The jury was also instructed, in the alternative, on the lesser included offense of attempted murder, which did not require a finding that Nguyen was a peace officer:

> Now, if you find from the evidence beyond a reasonable doubt that on or about October 21, 2017, in Dallas County, Texas, the defendant Donald Ramel James White, *with the specific intent to commit the offense of murder* of Thinh Nguyen, hereinafter called complainant, did an act, to-wit: stab, cut or choke the complainant with a knife, a sharp object, or hands, deadly weapons, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended, then you will find the defendant guilty of the lesser included offense of Attempted Murder.
>
> If you should find from the evidence beyond a reasonable doubt that the defendant is guilty of Attempted Capital Murder or Attempted Murder, but you have a reasonable doubt as to which offense he is guilty of, then you should resolve that doubt in the defendant's favor and find the defendant guilty of the lesser included offense of Attempted Murder.

> If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge, you will acquit the defendant and say by your verdict "Not Guilty."

(emphasis added).

Appellant did not object to these instructions, nor did he request any special charge. The jury returned a guilty verdict of attempted capital murder.

A Definition of "Specific Intent to Kill" Not Needed

In his third issue, appellant claims that the trial court should have defined "specific intent to kill" in the abstract portion of the jury charge.[1] Appellant further claims that the trial court should not have instructed the jury on the mental states of "intentionally" and "knowingly" because the charge, by so doing, "expanded the mens rea" and allowed the jury to convict him of attempted capital murder without finding that he had a specific intent to kill.

The offense of criminal attempt contains the following elements: 1) a person, 2) with specific intent to commit an offense, 3) does an act amounting to more than mere preparation, and 4) that tends but fails to effect the commission of the offense intended. PENAL § 15.01(a). The element of "specific intent" has been interpreted to mean, in an attempted murder case, that the actor must have the intent to bring about the desired result, *i.e.*, the death of the individual. *See Flanagan,* 675 S.W.2d at 741;

[1] Appellant does not offer an example of how his desired jury charge on "specific intent to kill" should be worded.

Fulford v. State, No. 05-10-00820-CR, 2012 WL 752623, at *3 (Tex. App.—Dallas Mar. 8, 2012, no pet.) (not designated for publication).

Jurors are not authorized to return a verdict except under those conditions given by the application paragraph of the charge. *Delapaz v. State*, 228 S.W.3d 183, 212 (Tex. App.—Dallas 2007, pet. ref'd). Because of the specific intent requirement for committing the offense of criminal attempt, either for attempted murder or attempted capital murder, the State must prove that the defendant had the specific intent to kill his intended victim. The application paragraph properly instructed the jury that it could only convict appellant of attempted capital murder if the jury found, beyond a reasonable doubt, that appellant acted "with the specific intent to commit the offense of murder." No additional instruction was required. *See Roberson v. State*, 144 S.W.3d 34, 41 (Tex. App.—Fort Worth 2004, pet. ref'd) (holding that where the application paragraph on attempted murder properly required the jury to find the defendant had the requisite intent to kill or murder, a definition of intent to kill was unnecessary); *Fulford*, 2012 WL 752623, at *4 (holding that an application paragraph which instructed the jury the defendant could only be convicted of attempted murder if the jury found beyond a reasonable doubt that the defendant acted "with the specific intent to commit the offense of murder" informed the jury that a specific intent was required for the charged offense).

The jury charge informed the jury, in both the abstract and application portions, that specific intent to commit capital murder was required for the charged

offense. The application paragraph required the jury to find beyond a reasonable doubt that appellant acted with specific intent to commit capital murder in order to find him guilty of attempted capital murder. As a result, the jury charge was not required to give a separate definition of "specific intent to kill." *Roberson*, 144 S.W.3d at 41; *Fulford*, 2012 WL 752623, at *3–4.

Further, inclusion of a definition of "knowingly" in the abstract portion of the jury charge did not authorize a conviction in the absence of a specific intent to kill. The culpable mental state of "knowingly" is part of the definitions of murder and capital murder. PENAL §§ 19.02(b)(1), 19.03(a)(1). While this term was defined in the abstract portion of the charge, it is the application paragraph of the charge, not the abstract portion, that authorizes a conviction. *Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012). The definition of "knowingly" was not applied to the facts in the application paragraph, so it did not authorize the jury to convict on this theory. *Id*. (holding that an abstract charge on a theory of law that is not applied to the facts does not authorize the jury to convict upon that theory).

We conclude that the trial court did not err by not including a definition of specific intent in the jury charge. We further conclude that the definition of "knowingly" did not expand the mens rea the State was required to prove in order to obtain a conviction because that definition was not applied in the application paragraph. We overrule appellant's third issue.

"Knowing" Need Not Be Further Defined

In his fourth issue, appellant claims the jury charge is erroneous because the trial court did not "tailor" the definition of the culpable mental state of "knowingly" to the aggravating element of the offense, *i.e.*, appellant's knowledge that Nguyen was a peace officer. *See* PENAL § 19.03(a)(1). Specifically, appellant claims that the jury should have been given the following definition in the abstract portion of the charge: "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." PENAL § 6.03(b).

The definition of "knowingly" in the Penal Code includes two sentences.[2] The language appellant sought to include in the charge is the first sentence of the definition. The jury was given the second sentence of the definition, *i.e.*, "[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." *Id*.

[2] The full definition of "knowingly" contained in the Penal Code is as follows:

> 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.

PENAL § 6.03(b).

Capital murder is a result of conduct offense,[3] though it may contain both nature of conduct and/or nature of circumstances elements depending upon the underlying conduct which elevates the intentional murder to capital murder. *Patrick*, 906 S.W.2d at 491. There are situations in which the statutory definitions of any given mens rea need to be limited to specific conduct. *See, e.g.*, *Hughes v. State*, 897 S.W.2d 285, 295 (Tex. Crim. App. 1994) (in prosecution for capital murder of peace officer, "[t]he State was required to prove that appellant intentionally or knowingly caused the death of the deceased (result of conduct), and that appellant knew the deceased was a peace officer (circumstances surrounding the conduct)"); *Gonzalez v. State*, No. 05-14-00830-CR, 2015 WL 4657527, at *6 (Tex. App.—Dallas Aug. 6, 2015, no pet.) (mem. op., not designated for publication) (holding, in a capital murder prosecution where the aggravating factor was the age of the victim, the jury charge should have limited the statutory definition of knowingly solely to result of conduct); *see also Ruffin v. State*, 234 S.W.3d 224, 226 (Tex. App.—Waco 2007), *rev'd on other grounds*, 270 S.W.3d 586 (Tex. Crim. App. 2008) (noting, in a prosecution for aggravated assault on multiple public servants, there were two "mens rea elements;" the State had to prove the defendant "intentionally or knowingly" threatened the complainants and the defendant "did then and there know" that each complainant was a public servant). This case, however, does not present one of those

[3] An offense may involve three conduct elements: (1) the nature of the conduct; (2) the result of the conduct; and/or (3) the circumstances surrounding the conduct. *See McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989); *Ash v. State*, 930 S.W.2d 192, 194 (Tex. App.—Dallas 1996, no pet.).

situations because appellant was not charged with capital murder or aggravated assault. Rather, appellant was charged with, and ultimately convicted of, attempted capital murder.

Criminal attempt is a separate and distinct offense. It is codified as a separate offense in the Penal Code. Additionally, case law holds that an indictment charging criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted. *Wood v. State*, 560 S.W.3d 162, 165 (Tex. Crim. App. 2018) (an indictment properly charged attempted capital murder even though no aggravating factor raising the offense from murder to capital murder was alleged); *see also Bertram v. State*, 579 S.W.3d 661, 666–67 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (holding that an indictment charging attempted aggravated kidnapping was not defective because it failed to identify any aggravating factor in a prosecution for attempted aggravated kidnapping); *McCay v. State*, 476 S.W.3d 640, 644–45 (Tex. App.—Dallas 2015, pet. ref'd) (holding that an indictment charging attempted theft was not required to allege the underlying constituent elements of theft); *Alavian v. State*, No. 05-15-01549-CR, 2017 WL 1245418, at *7 (Tex. App.—Dallas Apr. 5, 2017, pet. ref'd) (mem. op., not designated for publication) (holding that an indictment charging attempted sexual assault was not required to allege all constituent elements of the offense of sexual assault). It logically follows that, because an indictment for attempted capital murder need not allege all of the

constituent elements of capital murder, the jury charge for attempted capital murder need not allege all of the constituent elements of capital murder.

Further, while a separate offense from capital murder, attempted capital murder is also a result of conduct offense. *See Mendoza v. State,* No. 13-09-0027-CR, 2011 WL 2402045, at *9 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op., not designated for publication); *Rios v. State*, No. 07-04-00483-CR, 2005 WL 3000484, at *1 (Tex. App.—Amarillo Nov. 9, 2005, pet. ref'd) (mem, op., not designated for publication); *Reid v. State*, No. 14-02-00535-CR, 2003 WL 297799, at *1 (Tex. App.—Houston [14th Dist.] Feb. 13, 2003, pet. ref'd) (mem. op., not designated for publication). Therefore, the proper definition of the culpable mental state of "knowingly" should be limited to include only the result of conduct element. *See Hughes*, 897 S.W.2d at 295; *see also Cook v. State*, 884 S.W.2d 485, 491–92 (Tex. Crim. App. 1994). Because the trial court limited the definition of "knowingly" to the result of conduct, the court gave the proper definition in the abstract portion of the charge. We overrule appellant's fourth issue.

Knowledge of Peace Officer Status is Not an Element of Criminal Attempt

In his fifth issue, appellant claims the jury charge erroneously omitted an element of the offense from the application paragraph, *i.e.*, that appellant knew Nguyen was a peace officer.

Capital murder of a peace officer requires proof that a defendant knew his victim was a peace officer. PENAL § 19.03(a)(1). However, appellant was not

charged with capital murder but rather with attempted capital murder of a peace officer. Knowledge of the intended victim's status as a peace officer is not a specific element of attempted capital murder. *See* PENAL § 15.01(a); *Wood*, 560 S.W.3d at 165.

Nevertheless, in the abstract portion of the charge, the jury was instructed on the elements of capital murder of a peace officer which specifically included knowledge of the victim's status as a peace officer: "and who the person knows is a peace officer." In the application paragraph for attempted capital murder, the jury was instructed that it must find that appellant acted "with the specific intent to commit the offense of capital murder of Thinh Nguyen, *a peace officer*" in order to convict. In contrast, in the application paragraph for the lesser included offense of attempted murder, the description of Nguyen as a peace officer was omitted: "with the specific intent to commit the offense of murder of Thinh Nguyen."

"Specific intent to commit capital murder" is the sole culpable mental state required for attempted capital murder. No other culpable mental state, including knowledge of the intended victim's status as a peace officer, was required. We overrule appellant's fifth issue.

No Egregious Harm

Even if we were to find error in the charge, appellant has not suffered any harm, much less egregious harm.

As noted above, because there was no objection to the charge or request for a special instruction, in order to reverse appellant's conviction we must find egregious harm. In evaluating a jury charge for egregious harm, we consider (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information reflected in the record of the trial as a whole. *Trejo,* 280 S.W.3d at 261 (quoting *Almanza*, 686 S.W.2d at 171). Our review is not limited to parts of the charge standing alone. *Salahud-din,* 206 S.W.3d at 210.

The Entire Jury Charge

The entire jury charge correctly defined capital murder in the abstract portion, instructing the jury that "[a] person commits the offense of capital murder if the person intentionally or knowingly causes the death of an individual who is a peace officer who is acting in the lawful discharge of an official duty and who the person knows is a peace officer." PENAL §§ 19.02(b)(1), 19.03(a)(1). The charge also correctly defined "peace officer" as "a police officer of an incorporated city, town[,] or village." *Id*. § 1.07(a)(36); CRIM. PROC. art. 2.12(3). The application paragraph required the jury to find that appellant had the "specific intent to commit the offense of capital murder of Thinh Nguyen, a peace officer" before it could convict him of attempted capital murder. Thus, the entire charge instructed the jury that it could convict only if it found that appellant intended to murder a peace officer.

The State of the Evidence

The record as a whole shows that both the prosecution and the defense focused on the evidence establishing that Nguyen was a police officer and that appellant knew Nguyen was a police officer. The jury heard evidence that Nguyen was a Farmers Branch police officer who worked part-time, with the approval of his department, as a courtesy officer for the Prairie Crossing apartment complex. He generally wore his "bike uniform" and appellant had seen him in this uniform during all of their prior encounters. On the night of the attack, Nguyen identified himself as a police officer in response to appellant's accusation that he was a racist. During a jail phone call with his brother, appellant admitted he knew Nguyen was a "real" police officer and "a cop" because he had seen him in uniform before. And, as we have already concluded above, the evidence introduced at trial was sufficient for a rational jury to find that appellant knew Nguyen was a police officer at the time of the attack.

The Arguments of Counsel

The jury arguments of both defense counsel and the prosecutors focused extensively on the necessity of the jury to find that appellant knew Nguyen was a peace officer before it could convict him of attempted capital murder.

In final jury argument, the defense essentially conceded that appellant was guilty of attempted murder: "And I would ask you to find Donald White not guilty of attempted capital murder, but instead guilty of attempted murder." Defense

counsel further argued "I think the proper charge in this case is not attempted capital murder, because I don't think the State has proven to you or ruled out the possibility that Donald White did not know Officer Nguyen was . . . a police officer at the time of the assault." Defense counsel asked the jury to focus on whether the evidence showed beyond a reasonable doubt that appellant knew Nguyen was a police officer at the time he attacked him:

> You have to rule out every reasonable doubt that you have about what the offense is and how they've alleged it. And in this case, I submit to you that they haven't done that. They haven't ruled out the possibility that Donald White did not know that Officer Nguyen was a police officer.

Defense counsel went on to argue that Nguyen was not in uniform at the time the attack happened, the prior contacts between Nguyen and appellant were very brief, it was not "readily and obviously apparent" from Nguyen's summer uniform that he is a police officer,[4] and other residents of the complex did not know that Nguyen was a police officer. Defense counsel also called into question Nguyen's testimony that he told appellant he was a police officer and argued that it was unclear from the jail phone call that appellant said he knew Nguyen was a police officer at the time he attacked him.

The State began its arguments as follows:

> Members of the jury, as I said a moment ago, this case has very simple parts. Was he a police officer, did the defendant know it, and

[4] Defense counsel argued that the uniform "could very easily be the uniform of a security guard."

> did he try to kill him? In the defendant's own words, he tried to "take him out." In the defendants own words, "I knew he was a police officer."

The State went on to argue that there was no reason for appellant to attack Nguyen except that appellant knew Nguyen had the authority to remove him from the property on which he was trespassing:

> There is no other reason for Donald White to attack Officer Nguyen except for Officer Nguyen's authority.
>
> There's no reason for him to attack him except for the fact that he had the authority to remove him from the property. And if he attacked him for his authority, then he knew he was a police officer who could do something about him being there. It's as simple as that.
>
> He attacked him because he knew he was a police officer and he could remove him from the property. And so right then and there, he decided to remove Officer Nguyen instead.
>
> *
>
> But, again, there's no reason to attack him unless he has the authority to do something about it.

The State continued its arguments by focusing on whether Nguyen was in the lawful discharge of his duty at the time the attack occurred:

> And so the questions are: Was he lawfully doing his job, and did Donald White know he was an officer? And it comes down to that. There's not other things you need to look at or decide.
>
> *
>
> Lawfully doing his job. We heard evidence that he is a certified peace officer, that he has a part–time job as a courtesy officer. And the policy actually does apply to – the way you read it, you don't separate it out. When you read the policy yourself, if you need to, an off-duty

> police officer who has been approved to work out of uniform is considered an on-duty police officer.
>
> And identifying himself as a peace officer in the situation where he is encountering a crime was legal. And you heard testimony from his lieutenant supervisor and from other officers that that was perfectly within his rights as a police officer.

The State further argued that appellant clearly knew Nguyen was police officer:

> And then that he knew he was a police officer. Officer Nguyen told you about prior contacts he had with him. He gave you details of the conversation, of where he was sitting. We know from his testimony that he was in police uniform because it was always at that timeframe when he was patrolling the area before work in uniform.
>
> And isn't that interesting that Donald White tells you on the jail call, "I knew he was a cop. I've seen him before. I've seen him in his uniform."

Last, in briefly addressing the charge which permitted a conviction of the lesser included offense of attempted murder, the State argued that it was not an appropriate verdict because Nguyen was a police officer:

> Basically a verdict of guilty on attempted murder completely throws out the fact that Officer Nguyen was a Farmers Branch police officer. It completely throws out the fact that the only reason Officer Nguyen was talking to Donald White is because of his duty as a courtesy officer. . . And . . . what he's guilty of is attempted capital murder, because we have a peace officer who was doing his job and who got brutally attacked, pursued, and nearly, nearly killed for it. And so that's why the only just verdict is attempted capital murder.

It is inconceivable the jury could have failed to appreciate, from the length and depth of the arguments of both the prosecutors and the defense attorney, that the

main focus of the prosecution centered on whether the jury found that Nguyen was a peace officer at the time appellant attacked him.

Other Relevant Information

During deliberations, the jury asked to listen again to the recording of appellant's jail call acknowledging that he knew Nguyen was a police officer. The trial court brought the jury into the courtroom where the recording of the jail call was played again, at least twice, at the jury's request. The jury thereafter returned a verdict of guilty on the attempted capital murder charge.

Additionally, as noted above, the jury was also charged on the lesser included offense of attempted murder which did not require any finding that Nguyen was a peace officer. If the jury had failed to find that Nguyen was a peace officer at the time appellant attacked him and that appellant knew he was a peace officer, or if the jury had any reasonable doubt, the jury was authorized to find appellant guilty of the lesser included offense of attempted murder. The presence of an alternative offense mitigates any claim of egregious harm.

After considering the charge in its entirety, we conclude that appellant has not established harm, much less egregious harm.

Conclusion

The trial court's judgment is affirmed.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DONALD RAMEL JAMES WHITE, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1722670-V.
No. 05-19-00438-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and Carlyle participating.
THE STATE OF TEXAS, Appellee	

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

Judgment entered August 17, 2020