Opinion issued October 27, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-07-00860-CR

JOSEPH DENVER SMITH, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law 4
Harris County, Texas
Trial Court Case No. 1447260

MEMORANDUM OPINION

A jury convicted appellant Joseph Denver Smith of indecent exposure. The court assessed a punishment of 180 days' confinement, probated for a period of eighteen months, and a fine of $500.00. Smith initially argued that the trial court erred in denying his motion to quash the information charging him with indecent exposure due to a "fundamental defect." A panel of our court affirmed. The Court of Criminal Appeals granted review on the issue and reversed our court, holding that, although the information did not have a "fundamental defect," it nonetheless was defective in substance insofar as it failed to allege the particular act or acts relied on by the State to show Smith's recklessness. The Court of Criminal Appeals remanded the case back to our court for a determination of what harm analysis, if any, applies to a defect of substance in an information. In *Mercier v. State*, the Court of Criminal Appeals later clarified that Rule of Appellate Procedure 44.2(b) is the appropriate harm analysis to apply to a defect in substance in a charging instrument. 322 S.W.3d 258, 264 (Tex. Crim. App. 2010). Having conducted the Rule 44.2(b) harm analysis, we find that the defect in substance in this case did not affect Smith's substantial rights. We affirm.

Background

On the afternoon of April 12, 2007, an undercover Houston police officer, Farquhar, parked in a parking lot in Memorial Park. Officer Farquhar was working

undercover as part of a response to reports of individuals engaging in sexual behavior in that area of the park. From his unmarked vehicle, Officer Farquhar watched Smith drive up and park nearby. The two men exchanged glances and nods. Officer Farquhar then left his car and walked down a path to the patio area of a bathroom building in the park. A short time later Smith left his car and joined Officer Farquhar outside the bathroom building. The two stood approximately one to two feet apart. Officer Farquhar placed his hand in his pants as if to touch his genitals, and Smith masturbated, eventually exposing his penis to Farquhar. Farquhar then identified himself as a police officer and arrested Smith.

Smith was charged by information with indecent exposure under Texas Penal Code section 21.08, which provides in relevant part:

> A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act.

TEX. PENAL CODE ANN. § 21.08 (West 2011).

The information charging Smith alleged:

> [I]n Harris County, Texas JOSEPH DENVER SMITH, hereafter styled the Defendant heretofore on or about APRIL 12, 2007, did then and there unlawfully expose his GENITALS to S. FARQUHAR with intent to arouse and gratify the sexual desire of THE DEFENDANT, and the Defendant was reckless about whether another person was present who would be offended and alarmed by the act, to wit: THE DEFENDANT EXPOSED HIS PENIS AND MASTURBATED.

Smith moved to quash the information on the basis that the State failed to allege what act or acts constituted recklessness as required by article 21.15 of the Texas Code of Criminal Procedure. Specifically, Smith argued that the State did not allege that the acts occurred in a public place. Article 21.15 provides:

> Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

See TEX. CODE CRIM. PROC. ANN. art. 21.25 (West 2010). The trial court overruled Smith's motion to quash. Smith pleaded not guilty and, following a one-day jury trial, was found guilty and sentenced by the court.

Smith appealed the denial of his pretrial motion to quash. This court held that the information sufficiently described the acts relied upon to constitute recklessness, and that the trial court did not err by denying Smith's motion to quash the information. *Smith v. State*, No. 01-07-00860-CR, 2008 WL 4965322, at *2 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008), *rev'd*, 309 S.W.3d 10 (Tex. Crim. App. 2010) (holding that the requirement that the State allege "the circumstances of the act which indicate that the defendant acted in a reckless

manner" was "met by the assertion that appellant 'exposed his penis and masturbated'").

The Court of Criminal Appeals granted review and reversed. It held that, while the information was "sufficient to satisfy due-process notice requirements," this court had erred in finding the information satisfied the requirements of article 21.15. *Smith v. State*, 309 S.W.3d 10, 19 (Tex. Crim. App. 2010). It noted that the information "would have sufficiently apprised Smith of the act or acts constituting recklessness if the State had alleged that Smith exposed his penis and masturbated in a public place. Indeed, that is what the State ultimately showed at trial." *Id.* at 16. The Court found the error in the information was a defect of substance. *Id.* at 18. It concluded by noting that it had "never squarely addressed" which, if any, harm analysis would apply to substance defects that did not implicate constitutional concerns and remanded the case for this court to determine which harm analysis, if any, should apply.

Discussion

Mercier answers the question

Five months after the Court of Criminal Appeals remanded this case, it decided *Mercier v. State.* 322 S.W.3d 258, 263 (Tex. Crim. App. 2010). In *Mercier*, the appellant appealed the trial court's denial of his motion to quash the indictment for failure to include language concerning tolling of the statute of

limitations. *Id.* at 259. The Corpus Christi Court of Appeals found the failure to include the language was a defect in substance but declined to apply a harm analysis. *Id.* at 260–61. The Court of Criminal Appeals held that the court of appeals erred in not applying a harm analysis as the Court had outlined in *Tita v. State*, a similar indictment defect case. *Id.* at 263; *see Tita v. State*, 267 S.W.3d 33 (Tex. Crim. App. 2008). The Court reversed and remanded, directing the court of appeals to conduct a harm analysis under Texas Rule of Appellate Procedure 44.2(b). *Id*. at 263–64 (noting Texas Rule of Appellate Procedure 44.2(b) deals with non-constitutional error, including defects of substance). In *Mercier*, the Court made it clear that its holding applies to this case as well: it expressly states that *Mercier* answers the question left open—and remanded for us to decide—in *Smith*. *Id.* at 263. Accordingly, although Smith contends, without explanation, that *Mercier* "is not controlling for purposes of this case," we conclude that *Mercier* requires us to apply a Rule 44.2(b) harm analysis to this case.

Rule 44.2 standards

Texas Rule of Appellate Procedure Rule 44.2, which governs reversible error in criminal cases, bifurcates harm analysis. Subsection (a) applies to constitutional error while (b) applies in cases involving non-constitutional error. See TEX. R. APP. P. 44.2.[1] We apply 44.2(b) because the error at issue is not

[1] Texas Rule of Appellate Procedure 44.2 provides:

constitutional in nature. *See Smith,* 309 S.W.3d at 19 (information did not satisfy requirements of article 21.15 but was "sufficient to satisfy due-process notice requirements").

In applying Rule 44.2(b), an appellate court must disregard non-constitutional error unless it affects the appellant's substantial rights. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). An appellate court should not overturn a criminal conviction for non-constitutional error "if the appellate court, *after examining the record as a whole*, has fair assurance that the error did not influence the jury, or influenced the jury only slightly." *Id.* (emphasis original) (reversing court of appeals' holding that error was harmful and remanding for a full harm analysis); *Nonn v. State*, 117 S.W.3d 874, 881 (Tex. Crim. App. 2003) (in conducting 44.2(b) harm analysis, appellate courts must decide whether the error had a substantial or injurious effect on the jury verdict); *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000) ("A substantial right is affected when the

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(a) *Constitutional Error*. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) *Other errors*. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

TEX. R. APP. P. 44.2(b).

error had a substantial and injurious effect or influence in determining the jury's verdict.").

In considering the potential to harm, the focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict. *Barshaw*, 342 S.W.3d at 93–94. A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error. *Id.* at 94. "Grave doubt" means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id*. (quoting *Burnett v. State*, 88 S.W.3d 633, 637–38 (Tex. Crim. App. 2002)). In cases of grave doubt as to harmlessness, the appellant must win. *Id.*

Properly admitted evidence of guilt is one factor to consider when performing an analysis under Rule 44.2(b). *Nonn*, 117 S.W.3d at 883. Another relevant factor is the character of the alleged error and how it might be considered in connection with other evidence in the case. *Id.* The Court of Criminal Appeals elaborated further on the analysis in *Morales*:

> In assessing the likelihood that the jury's decision was adversely affected by the error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. The reviewing court might also consider the jury instruction given by the

> trial judge, the State's theory and any defensive theories, closing arguments and even voir dire, if material to appellant's claim.

32 S.W.3d at 867.

Finally, when the error relates to a defect in the charging instrument, it is appropriate to consider whether the instrument, as written, fails to inform the defendant of the crime charged so as to allow him to prepare an adequate defense at trial, and whether the instrument would subject the defendant to the risk of being prosecuted later for the same crime. *See Gonzalez v. State*, 337 S.W.3d 473, 480 (Tex. App.—Houston [1st Dist.] 2011, pet denied) (citing *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001); *Tita v. State*, No. 14-06-00736-CR, 2009 WL 1311813 *2 (Tex. App.—Houston [14th Dist.] May 7, 2009, pet. ref'd) (mem. op., not designated for publication) (considering whether the charging instrument, as written, informed defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted charging instrument would subject him to the risk of being prosecuted later for the same crime).

Application of Rule 44.2(b)

A. Smith's contentions regarding harm

Smith contends he was harmed by the deficient information throughout the trial, but his allegations fall into two categories. First, Smith claims he was left to "guess what acts the State might say constitute recklessness on his part," rendering

his pre-trial investigation ineffective. The Court of Criminal Appeals has already resolved this lack of notice claim against Smith. *Smith*, 309 S.W.3d at 16 (finding "the information charging Smith with indecent exposure was sufficient to satisfy due-process notice requirements"). We must follow its holding.

Because the error relates to a charging instrument, we consider whether the information failed to inform Smith of the charges being brought against him as to allow him to prepare an adequate defense at trial, and whether the instrument would subject him to the risk of being prosecuted later for the same crime. *See Gonzalez*, 337 S.W.3d at 480 (citing *Gollihar*, 46 S.W.3d at 246). Based on the Court of Criminal Appeals' finding that the information was sufficient to satisfy due-process notice requirements, we conclude that, despite the error in the information, the information informed Smith of the crime charged and did not impair his ability to prepare an adequate defense at trial. *See id.*; *see also Tita*, 2009 WL 1311813 at *2 (holding that the absence of a tolling paragraph in the indictment "did not deprive appellant of notice of the conduct or offense for which he was being prosecuted"). Nor did the error in the information subject Smith to the risk of being prosecuted later for the same crime. *See Tita*, 2000 WL 1311813 at *2 (absence of a tolling paragraph in the indictment did not affect double jeopardy concerns).

Smith's second contention is that the omission in the information effectively lowered the State's burden of proof because the jury was able to convict Smith without a finding of all of the elements of the offense—specifically, without a finding of recklessness—beyond a reasonable doubt. For example, Smith complains that there was insufficient discussion throughout the trial of the element of recklessness, including how it could or must be proved in this case. Smith also contends that the jury did not understand that the State had the burden to prove Smith's recklessness beyond a reasonable doubt. We examine the record as a whole in light of this contention to determine whether the error had a substantial or injurious effect or influence on the jury's verdict. *Barshaw*, 342 S.W.3d at 93–94.

B. Evidence and discussion of "recklessness" at trial

The jury heard substantial evidence of Smith's guilt, including extensive discussion of the issue of recklessness throughout the trial. The State began its voir dire by listing the elements of the offense, including recklessness:

> The State has to prove beyond a reasonable doubt that on April 12, 2007, in Harris County, Texas, the defendant, Joseph Denver Smith, unlawfully exposed his genitals to S. Farquhar with the intent to arouse and gratify the sexual desire of the Defendant and he did so in a reckless manner *with some people being present*, basically, to wit: he exposed his penis and masturbated. *Now I have to prove each and every single one of these elements beyond a reasonable doubt*.

The State explained that the presence of other people is what made Smith's exposure and masturbation reckless.

The trial court had made similar comments to the venire. It explained that one of Smith's potential defenses might be that "he wasn't reckless about whether or not another person was present that could be alarmed by his act." It elaborated:

> Let's just say that you have the need to gratify yourself. . . . You go back in a real private place. Let's put you in your car. You're parked on the top floor of the parking lot at 10:00 o'clock at night and the garage is closed and you're being kind of cautious about anybody being around. The garage is closed, lights off, and you're parked in your car. You go ahead and do the act anyway. Well, somebody sees you doing it. The question was: Were you reckless about whether a person being present who would be alarmed or offended by the act? If you weren't reckless, it's not an offense. . . . So the question is a matter of privacy. . . . If you weren't reckless about where you are doing this act, it's not a crime.

The trial court later gave another example involving masturbation in a public restroom stall in the Galleria, noting it might be reckless to masturbate in the open area of the restroom as opposed to in a closed, locked stall at closing time in that same public restroom.

Finally, Smith's counsel told the venire that recklessness was an element of the offense. She referred to an example used by the court involving somebody "going into the woods or needing to urinate or going somewhere very secluded and urinating" and repeated:

> If someone goes and checks it out and makes sure that nobody else is around that person has not committed a crime. They have not been reckless. . . . Recklessness is not just ignoring risks, but you have to be ignoring a substantial and unjustifiable risk of somebody coming across you with your pants down to your knees or masturbating or whatever.

In addition to the discussion during voir dire, the jury heard substantial amount of evidence relevant to the question of Smith's recklessness. Officer Farquhar, the only trial witness, testified that the incident took place at 1:35 in the afternoon, during the park's operational hours. The jury saw photographs of the parking lot, the area behind the bathroom where Smith exposed his penis, and the path that leads from the parking lot to the bathroom. There was testimony about the distance from the path to the area, how long it takes to walk from the parking lot to the area in which Smith exposed himself, whether the path is open to the public, and whether Smith was visible from the parking lot or park trail.

On cross-examination, Officer Farquhar admitted that the area around the parking lot is fairly heavily wooded and that the ground cover in the area consists of leaves and debris. He testified that he personally could not hear Smith's footsteps as Smith approached, but that he did not know whether others would be able to hear a hypothetical passerby if one were approaching the area. When asked whether the area was "well enclosed," he responded that there are trees around the area, but also "aspects that make that area visible." He also said there were "lots of bike riders going around" and that "somebody else could have come around the corner" and seen them. Farquhar also reenacted the scene at the park to demonstrate the positions in which he and Smith were standing, their proximity to one another, and the extent to which their respective positions and the short

distance between them prevented others from observing that Smith was masturbating.

The jury charge recited the elements of the offense, including recklessness. It defined recklessness. And it informed the jury that the prosecution bore the burden of proving Smith guilty by "proving each and every element of the offense charged beyond a reasonable doubt[.]"

In closing argument, Smith's counsel told the jury:

> Even if you believe the officer that Mr. Smith exposed himself and masturbated in those woods, we've got a little problem with the elements of this offense. This (demonstrating) is the Prosecutor's analysis for you of the elements of this offense, but she's left something out here. She's left out that you have to be reckless about whether another person was present and whether that person is likely to be offended or alarmed by their behavior. You have to be reckless about that. . . . Nobody is gonna be able to see Mr. Smith doing whatever he was doing, even if he was doing it, which is something that we question. This area is extremely secluded. . . . Was Mr. Smith reckless even if people would happen by? He knew nobody was there except Officer Farquhar. . . . So, I don't know if you believe the officer or not, but if, in fact, you do, the bottom line is Mr. Smith was not reckless with regards to whether or not another person was present who would be alarmed or offended by his actions. That's all I have, ladies and gentlemen. He needs to be acquitted.

The State also addressed recklessness extensively in its closing argument:

> [P]eople see this. That's why it's indecent. Because people walk up and they are alarmed and offended. Because the men who participate in these activities are reckless. . . . This is in a wooded area at Memorial Park. This is next to a wooded path. This is next to a trail, next to a bike path. Next to a parking lot. . . . The defendant was reckless in the sense that at any moment that this was happening, a kid could have walked up and seen. That's why it's reckless. A kid could

> have walked up. A parent could have walked up. A bike rider could have walked up to use the restroom where he's doing this.

Our review of the record as a whole reveals that the jury was informed, repeatedly and in detail, that recklessness was an element of the offense and that the State had the burden to prove Smith's recklessness beyond a reasonable doubt. Contrary to Smith's contention that the jury was misled about whether recklessness was an element of the burden of proof, the record as a whole does not convey that the jury could convict without finding recklessness based on a finding beyond a reasonable doubt that Smith exposed his penis and masturbated, without finding that it occurred in a public place. Rather, the jury was informed that, in order to convict Smith, it must also determine that Smith was reckless beyond a reasonable doubt, and that, to make such a finding, it should consider the surrounding circumstances, including, for example, whether the area in which he exposed his penis and masturbated was secluded, enclosed, lit, and visible from the park path. Moreover, the State did not capitalize on the error before the jury, to the contrary, it proceeded on the basis of a proper charge. Only Smith's attorney mentioned in closing that the prosecutor had left something out. Given the record as a whole, we find this comment insufficient to affect Smith's substantial rights. *See Nonn*, 117 S.W.3d at 883 (finding no harm under Rule 44.2(b) even though there were specific references to the wrongfully admitted statement of appellant); *see also Motilla v. State*, 78 S.W.3d 352, 359–60 (Tex. Crim. App. 2002) (noting the

State's lack of emphasis on the wrongfully admitted testimony as a relevant factor in finding no harm).

Considering all of these factors and our review of the record as a whole, we find that the error in the information did not have a substantial or injurious effect or influence on the jury's verdict. *Barshaw*, 342 S.W.3d at 93–94; *see Motilla*, 78 S.W.3d at 359–60 (considering all evidence and relevant factors, error in admitting testimony was harmless under a Rule 44.2(b) analysis); *see also Nonn*, 117 S.W.3d at 883 (looking to the relevant analysis factors, error in admitting appellant's statement was not harmful under Rule 44.2(b)); *Coleman v. State*, 131 S.W.3d 303, 313 (Tex. App.—Corpus Christi 2004, pet. ref'd) (when indictment failed to allege acts constituting recklessness, the defect found not harmful because defendant was sufficiently aware of the acts to prepare a defense).

Conclusion

After examining the record as a whole, we conclude that the State's failure to allege in the information the acts relied on to show recklessness did not affect Smith's substantial rights. Accordingly, under Rule 44.2(b), we must disregard the error. The judgment of the trial court is affirmed.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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