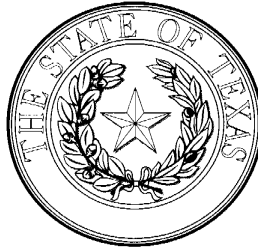


Opinion issued August 6, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00218-CR

JEREMY GEROD SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1419920**

MEMORANDUM OPINION

Jeremy Gerod Smith appeals his conviction for murder with a deadly weapon. In one issue, he contends that the jury charge was erroneous. The State responds that the charge was not erroneous, and even if it were, Smith did not suffer egregious harm. The State points out that the judgment contains a clerical

error—it does not list a deadly weapon finding. We modify the judgment to reflect the deadly weapon finding and affirm the judgment as modified.

Background

Samuel Moreno, Jr. was shot and killed at an apartment complex in August 2013. After an investigation, Smith was charged with the murder. TEX. PENAL CODE § 19.02.

At trial in 2019, Harris County Sheriff’s Deputy K. Tarrance testified that he was on patrol when he responded to a shooting call. He discovered Moreno’s body in a common area of the apartment complex. Deputy Tarrance secured the scene, including separating witnesses and controlling the crowd of 20 to 30 people gathered nearby. Deputy A. Menchaca arrived shortly after. He testified that he photographed the scene and marked items as evidence. He found several spent cartridge casings and fired projectiles from a firearm.

Jacob Cruz, a resident of the complex, testified that he was sitting on his balcony just before the shooting. From his balcony, he saw a Latino man on crutches in an argument with a Black man, who was wearing a tank top and khaki shorts. He recognized both men from around the complex, but he did not know either personally. The men had a verbal argument and then separated. As they separated, the Black man, who was soon joined by two other men, had a gun. About ten minutes later, Cruz heard gunshots, but he did not see the shooting. Cruz

identified Smith in a photo array and in court as the Black man he saw with the gun.

Ishmail Johnson lived at the apartment complex at the time of the shooting. He testified that he was waiting to meet someone outside the apartment complex when he heard about six gunshots. He went to higher ground and saw a man in the courtyard shooting a handgun. He could see the muzzle flash with each shot. He then saw the shooter and another man run deeper into the complex. Johnson ran back to his apartment, which was in the direction of the shooting. He passed Moreno, who was leaning against a wall holding himself up. Johnson spoke to detectives when they arrived and told them that he had a partial view of the shooter. He later identified Smith in a photo array as the person he saw shooting, and he identified Smith in the courtroom as the same person.

Deputy M. Ritchie testified that he arrived at the scene in the middle of the night and began canvassing for witnesses by knocking on apartment doors. Several residents had heard shots. A resident told him that he had seen the shooter, and he led Deputy Ritchie to an area with several spent shell casings.

Over the next several months, Deputy Ritchie continued to investigate the case. He identified Joshua Broussard and Jeremy Smith as two possible suspects. After he spoke with Broussard, Deputy Ritchie did not recommend charges against

him.¹ After developing suspects, he asked Cruz and Johnson to view photo arrays. They each identified Smith in the arrays. Deputy Ritchie then contacted the district attorney's office to recommend charges against Smith.

A firearms examiner from the Harris County Institute of Forensic Sciences testified that she reviewed 12 fired cartridge casings and 6 fired bullets recovered at the scene. She identified all 12 casings as CCI brand .380 auto cartridge cases. Some of the bullets came from the same gun as the casings. Due to damage to the bullets, she could not test them all, but she testified that more likely than not all of the bullets came from the same type of gun. She also stated that the forensic evidence was not indicative of multiple shooters.

A Harris County medical examiner testified that he oversaw Moreno's autopsy. Moreno died of a gunshot wound that entered his shoulder and traveled to his chest. The bullet hit his spinal cord, which would have caused him to become immediately incapacitated and unable to move from the waist down. The examiner concluded that Moreno's death was a homicide.

Smith testified in his own defense that he was with the person who shot Moreno but was not the shooter. He stated that an acquaintance, Joshua Broussard, was the shooter. Smith testified that, on the night of the shooting, Broussard gave him a loaded gun and asked him to accompany him to confront Moreno. Broussard

¹ Broussard was deceased by the time of trial.

was upset because Moreno had accused Broussard of burglarizing his home. Smith believed that Broussard wanted to go to the apartment complex and scare Moreno so that he would not call the police about the burglary.

Smith testified that another individual, whom he did not know, drove them to the apartment complex. When they arrived, Broussard and Moreno had a heated argument, and then they separated. As Broussard walked off, he asked Smith why he had not threatened Moreno with the gun. Smith replied that he no longer wanted to threaten Moreno after he saw that Moreno used crutches. According to Smith, Broussard saw Moreno walk by again, pulled out a gun, and started shooting. Smith did not shoot because he did not believe that Moreno was a threat. Broussard and Smith ran back to the car and left.

Smith testified that when first informed he was charged with murder, he told the detective that he was not at the apartment complex on the night of the shooting. He claimed that he did not realize the severity of the situation and did not want to be a part of the investigation. On cross-examination, Smith agreed that, after being charged with murder, and in the six years between the incident and the trial, he had never told anyone that Broussard was the shooter until he testified.

The jury found Smith guilty of murder with a deadly weapon, and the trial court sentenced him to 35 years' imprisonment.

Jury Charge Error

In his sole issue, Smith contends that the trial court erred in submitting an erroneous charge to the jury that did not include definitions of criminal responsibility for another person's conduct. *See* TEX. PENAL CODE §§ 7.01–7.02.² Specifically, he argues that the definitions were not included in the abstract portion of the charge and were not sufficiently detailed in the application paragraphs to ensure that the jury was properly informed about the required elements to convict based on party responsibility. *See Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012) (stating that the jury charge must contain an accurate statement of the law and set out all of the essential elements of the offense). He asserts that the lack of definitions caused him egregious harm by denying him a fair and impartial trial. The State responds that the charge was not erroneous, and even if it were, Smith did not suffer egregious harm.

A. Standard of Review and Applicable Law

We review alleged charge error by first determining whether error exists in the charge. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). “If error exists, we then analyze the harm resulting from the error” to determine whether

² A person is a party to an offense if “the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.” TEX. PENAL CODE § 7.01(a). A person is criminally responsible for the conduct of another if, “acting with the intent to promote or assist in the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense. . . .” *Id.* at § 7.02(a)(2).

reversal is required. *Id.* In determining harm, we apply “separate standards of review depending on whether the defendant timely objected to the jury instructions.” *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. 2016) (applying *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh’g)). Because Smith failed to object at trial to the jury charge error, we will reverse only if the error was “so egregious and created such harm that the defendant ‘has not had a fair and impartial trial.’” *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) (quoting *Almanza*, 686 S.W.2d at 171).

Analysis

The abstract portion of the charge included the legal definitions for murder, acting intentionally, and acting with knowledge, among other relevant aspects of the law. It did not include definitions of party responsibility.

The charge allowed the jury to find appellant guilty on any one of four theories:

- (1) he intentionally or knowingly caused Moreno’s death by shooting him with a firearm; or
- (2) he intended to cause serious bodily injury to Moreno and caused death by knowingly or intentionally committing an act clearly dangerous to human life by shooting Moreno with a firearm; or
- (3) he or another person or persons intentionally or knowingly caused the Moreno’s death by shooting him with a firearm; or

- (4) he or another person unlawfully intended to cause the Moreno serious bodily injury and caused Moreno's death by committing an act clearly dangerous to human life, namely shooting him with a firearm and Smith "with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or persons to commit the offense."

Definitional language related to the law of parties appeared only after the fourth application paragraph. Smith contends that he was denied a fair and impartial trial because the jury could have erroneously convicted him under the third application paragraph, which did not explain criminal responsibility for the conduct of another. The State suggests that although the third theory did not include language explaining how the defendant could be criminally responsible for the action of another, Smith did not suffer egregious harm because the jury had the proper language to determine Smith's criminal responsibility for murder as a party because it was included in the application paragraph for the fourth theory of guilt.

Assuming without deciding that the jury charge was erroneous, we must determine whether Smith's complained of error egregiously harmed him. *Price*, 457 S.W.3d at 440. "Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis." *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011) (internal quotation and citation omitted). "Errors which result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or

make a case for conviction clearly and significantly more persuasive.” *Id.* at 490. “An egregious harm determination must be based on a finding of actual rather than theoretical harm.” *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). In examining the record for egregious harm, we consider the entire jury charge, the state of the evidence, the arguments of the parties, and any other relevant information in the record. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

After reviewing the record, we conclude that any error in the jury charge was not egregiously harmful because the evidence supported Smith’s guilt as a principal actor.

1. The Jury Charge

The jury charge contained four application paragraphs, or theories by which the jury could find Smith guilty of murder. The charge included all of the required definitions and application paragraphs for the first and second theories of guilt, which alleged that Smith was guilty of murder as the principal actor.

The third and fourth theories of guilt allowed the jury to convict Smith of murder based on party responsibility. The abstract portion of the charge did not define criminal responsibility for the conduct of another. The third application paragraph allowed the jury to convict Smith of murder if they found that “the defendant, another person or persons, did then and there unlawfully, intentionally

or knowingly cause the death of [Moreno] by shooting [him] with a deadly weapon, namely a firearm.” This paragraph did not explain under what circumstances Smith could be convicted if another person shot Moreno.

Only the fourth application paragraph described party responsibility and allowed the jury to convict if they found that Smith or another person unlawfully intended to cause serious bodily injury to Moreno but instead caused his death by intentionally committing an act clearly dangerous to human life, namely shooting him with a firearm. It explained that the jury could convict under this theory if they found that Smith “with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or persons to commit the offense.” While it is possible that the jury could have referenced the explanation of party responsibility found in the fourth theory of guilt when considering the third theory of guilt, we cannot say that the third application paragraph authorized a conviction under conditions “specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers” or contained “some logically consistent combination of such paragraphs.” *Vasquez v. State*, 389 S.W.3d at 367 (internal quotation and citation removed) (explaining level of detail required in application paragraphs when definitions are not repeated in the application but are only included in the abstract); *see also Standmire v. State*, 475 S.W.3d 336, 342 (Tex. App.—Waco

2014, pet. ref'd) (application paragraph authorizing conviction under conditions specified by other paragraphs in the charge is sufficient if the application paragraph necessarily and unambiguously refers to the other paragraphs or contains some logically consistent combination of paragraphs).

The jury charge contained all required elements for three of four theories of guilt. We conclude that the entirety of the jury charge weighs slightly in favor of a finding of egregious harm.

2. State of the Evidence

There was sufficient evidence for the jury to find beyond a reasonable doubt that Smith was the shooter and committed the murder. Two witnesses who did not know Smith identified him in photo arrays as the man they saw on the night of the shooting with a gun. Cruz saw Smith arguing with Moreno just before the shooting. He saw Smith with the gun, and then he heard several gunshots. Johnson saw Smith firing multiple shots from a gun.

Detectives recovered 12 spent cartridge casings and 6 fired bullets from the scene, and a firearms expert testified that all 12 casings were CCI brand .380 auto cartridge cases. The bullets that the expert was able to test came from the same gun as the casings, but due to damage to the bullets, the expert could not test all of them. She also stated that there was no evidence of multiple shooters in the

forensic evidence. The State never suggested that anyone other than Smith was the shooter.

When Smith testified, he stated for the first time—six years after the incident—that Broussard was the shooter. He claimed that Broussard gave him a gun and expected him to threaten Moreno with it. He testified that when he arrived at Moreno’s complex, he decided to abandon the plan to threaten Moreno because he did not want to threaten someone who used crutches. He then claimed that Broussard shot Moreno and that he did not know that Broussard was going to do so.

Based on the evidence presented, the jury had to decide whether it believed the State’s witnesses, who testified that Smith was the shooter, or Smith’s testimony that he was at the scene with a gun but did not shoot or encourage or assist Broussard in shooting Moreno. When faced with conflicting testimony, the jury could have disbelieved all or part of Smith’s testimony while crediting Cruz’s and Johnson’s testimony that Smith had a gun and was the shooter. *Thomas v. State*, 444 S.W.3d 4, 10 (Tex. Crim. App. 2014) (stating that the jury is the sole judge of credibility of witnesses and the weight to be given their testimony and may “believe all of a [witness’s] testimony, portions of it, or none of it.”). Based on the evidence presented, the jury could have found beyond a reasonable doubt

that Smith was guilty of murder as the principal actor. Accordingly, this factor weighs against a finding of egregious harm.

3. Counsels' Arguments

In closing, the State argued its theory that Smith was the primary actor and that he had a gun and shot Moreno, as the witnesses observed. The prosecutor also made clear that the law of parties only applied to make the appellant guilty of murder if he acted with intent to promote or assist in the murder, and he solicited, encouraged, directed, aided or attempted to aid someone else to commit it. The State explained to the jury that, “. . . if you're sitting there and you're thinking maybe there are two shooters and you don't know whose bullet actually killed [the complainant], then this defendant is still guilty of murder” as a party to the offense.

The defense's closing argument argued against the law of parties, theorizing that no evidence indicated Smith acted as a party. Smith's counsel emphasized Smith's testimony that he did not know that Broussard planned to shoot Moreno and that he did not assist Broussard in the murder in any way.

In rebuttal, the State again focused on the evidence that established Smith as the primary actor, noting that the evidence was comprised exclusively of the testimony of the two men present during the shooting, both of whom identified Smith as the gunman.

Both closing arguments focused on whether Smith was the shooter. The brief discussion of the law of parties given by the State clarified potential confusion on the third theory of liability, namely guilt as a party to the intentional shooting of the complainant. We conclude that this factor weighs against a finding of egregious harm.

4. Other Considerations

We note that, overall, neither the State nor Smith emphasized that he was guilty or not guilty based on party responsibility. From opening statements through closing, the State sought to prove that Smith was the shooter. The State's main witnesses were two uninvolved apartment complex residents. Cruz saw Smith in an altercation and with a gun shortly before he heard numerous shots. Johnson saw Smith shooting the gun multiple times. The State's firearms expert testified that forensic evidence suggested there was only one shooter.

Smith testified that he did not shoot the victim and that he did not anticipate, encourage, assist, or direct Broussard to shoot. He claimed that even though he had a loaded gun that night, he never fired it. Nothing in his testimony raised a claim that he acted as a party. Instead, if believed, he was not guilty of murder.

The evidence allowed the jury to convict Smith of murder as the primary actor. Had the jury believed Smith's version of events, they would have returned an acquittal on all counts. After reviewing the record, we hold that Smith did not

suffer egregious harm. *Barrios*, 283 S.W.3d at 350. We overrule Smith’s sole issue.

Clerical Error in the Judgment

The State asserts that the judgment does not accurately reflect the jury’s verdict because it does not include a deadly weapon finding. This court has the power to modify a trial court’s judgment to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b) (providing that appellate courts may modify judgments and affirm as modified). When a judgment and sentence improperly reflect the jury’s findings, the proper remedy is reformation of the judgment. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *DeAnda v. State*, 769 S.W.2d 522, 523 (Tex. Crim. App. 1989); *Aguirre v. State*, 732 S.W.2d 320, 327 (Tex. Crim. App. [Panel Op.] 1982).

The indictment charged Smith with committing murder by shooting the complainant with a deadly weapon, namely a firearm. The jury returned a verdict that found Smith guilty of murder as charged in the indictment, but the judgment does not reflect a deadly weapon finding. *See Polk v. State*, 693 S.W.2d 391, 394 (Tex. Crim. App. 1985) (stating the jury can make an affirmative finding by finding the defendant guilty “as charged in the indictment” when the indictment specifically characterizes the weapon used as “a deadly weapon”). A firearm is a deadly weapon per se. TEX. PENAL CODE § 1.07(a)(17)(A). We reform the

judgment to reflect the jury's finding that Smith was guilty of murder with a deadly weapon. TEX. R. APP. P. 43.2(b).

Conclusion

We reform the judgment to reflect the jury's affirmative deadly weapon finding. As reformed, we affirm the trial court's judgment.

Peter Kelly
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

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