

Opinion issued July 28, 2020



In The
Court of Appeals First District of Texas

NO. 01-19-00423-CR

LEEROY ANTHONY ENRIQUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 391st District Court*
Tom Green County, Texas
Trial Court Case No. D-18-0276-SB

MEMORANDUM OPINION

Leeroy Anthony Enriquez was convicted of assault on a peace officer and evading arrest. *See* TEX. PENAL CODE § 22.01(b-2) (assault); *id.* § 38.04 (evading arrest). After a jury trial, he pleaded true to an enhancement, and the trial court

* The Texas Supreme Court transferred this appeal from the Court of Appeals for the Third District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

sentenced him to 75 years' imprisonment for assault on a peace officer and a concurrent 730 days' confinement for evading arrest.

Enriquez appeals only his conviction for assault on a peace officer. On appeal, he contends that he was charged with assault on a public servant, a third-degree felony, rather than assault on a peace officer, a second-degree felony. He argues that the jury charge was erroneous, and he contends that his 75-year sentence for an enhanced second-degree felony is erroneous. We affirm.

Background

The State charged appellant by indictment with two counts. The heading at the top of the indictment stated that Enriquez was charged with "Ct. 1 Assault Peace officer/judge (§22.01(b-2))" and that the charge was a "Second Degree Felony Enhanced to First Degree Felony." The body of the indictment alleged that Enriquez "intentionally, knowingly, and recklessly cause[d] bodily injury to [E.] Chavarria . . . and [Enriquez] did then and there know that the said [E.] Chavarria was then and there a public servant, to wit: City of San Angelo Police Officer . . . lawfully discharging an official duty, to-wit: investigating a possible criminal trespass." The indictment also charged Enriquez with evading arrest. He pleaded not guilty to both charges and proceeded to a jury trial.

The jury heard testimony from Kimberly Adams, who testified that she saw Enriquez walking in the yard of a house she frequently passed. A bike was propped

by the gate of the house, and the gate appeared pried open. She thought Enriquez looked suspicious, so she approached him. Enriquez's speech was slow, and he was grasping for his thoughts.

Adams knew the owner of the house had died so she called the homeowner's granddaughter. The granddaughter called 911, and a police officer arrived shortly after. Adams spoke with the officer then drove down the street to wait. As she was driving, she saw Enriquez running away from the house. She did not see a police officer, so she called 911. A few minutes later, she saw the officer run into the front yard, acting like he was trying to get his bearings. She followed Enriquez for several minutes and continued to watch as police detained him.

Detective E. Chavarria testified that he was a detective with the San Angelo Police Department and had been with the department for more than 24 years. He testified that he is a certified peace officer. On the day of the incident, he was working patrol when he responded to a call of a suspicious person around a house. Upon arriving, he went to the backyard and approached a garage apartment at the back of the property. As he approached, he heard noises from inside the apartment. The door was open, and it sounded like someone was breaking something inside.

Detective Chavarria identified himself by shouting, "San Angelo Police Department" several times, and he was wearing his police uniform, badge, and gun belt. Enriquez came out of the garage apartment, and Detective Chavarria confronted

him in the yard. Detective Chavarria asked Enriquez what he was doing at the property. Enriquez replied that he had been given permission to fix up the property from its owner. Detective Chavarria became skeptical because he knew the last owner of the property died a few years earlier. He also suspected that Enriquez was under the influence of a narcotic because he was acting strangely. When asked for his identification, Enriquez backed away and went into the garage apartment. Detective Chavarria followed Enriquez into the apartment and watched him reach under the front of his shirt, as if he were reaching for his waistband. Detective Chavarria became concerned that Enriquez was armed and ordered him to put his hands up. When Enriquez did not comply, Detective Chavarria grabbed Enriquez's hands to restrain him, and a fight broke out.

The struggle continued as Detective Chavarria and Enriquez went out into the yard. Detective Chavarria struck Enriquez, who was kicking and hitting. Detective Chavarria tried to turn on his lapel microphone, knowing he could not say anything but perhaps a dispatcher would hear a scuffle and send additional officers. Enriquez started biting Detective Chavarria's chest, causing the detective to release his hold. Enriquez placed the officer in a chokehold. Detective Chavarria managed to unholster his sidearm and told Enriquez that he was going to shoot. Enriquez ran out of the yard and down the street.

Detective Chavarria testified that it was the second time in his 24-year career as a police officer that he feared for his safety. After using his radio to request back up, Detective Chavarria drove a few blocks to catch up with Enriquez and watched as his colleagues detained him.

Detective Chavarria testified that he had scratches and cuts on his knees, elbows, and arms; marks on his chest; and bruises on his neck. The jury viewed a video of the incident that was taken from his police car.

Officer C. Schneider testified that he had been a police officer with the San Angelo Police Department for nine years. While working patrol, he heard Detective Chavarria over the radio, and it sounded like he was fighting with someone. When he arrived at the scene, he saw Enriquez running from the house. Officer Schneider got out of his patrol car and chased Enriquez. According to Officer Schneider, Enriquez resisted while being apprehended and placed in handcuffs.

Detective K. Lane testified that he was a certified peace officer and had been with the San Angelo Police Department for seven years. When he investigated the garage apartment where Detective Chavarria and Enriquez fought, he found a loaded pellet gun on a table. He also interviewed Enriquez who stated that, although he knew Detective Chavarria was a police officer, he was trying to get away because he was scared. Detective Lane testified that Enriquez said he was reaching for

identification when the fight began, but no identification was found on Enriquez when he was arrested.

A fingerprint expert with the San Angelo Police Department testified that she had reviewed fingerprints from court documents. She concluded that the fingerprints on the documents matched Enriquez. The documents, judgments for prior convictions for evading arrest in a vehicle and violating the terms of community supervision, were admitted into evidence.

Enriquez did not present any evidence. The trial court read the jury the charge, which stated, “The Defendant stands charged by indictment in Count One of the offense of assault on a public servant.” The “Accusations” section of the charge stated that Enriquez was accused “of having committed the offense of Assault on a Public Servant” specifically against “Chavarria [who] was then and there a public servant, to wit: a City of San Angelo Police Officer.” Finally, the trial court read from the “Relevant Statutes” section of the charge which stated, “A person commits assault on a public servant if the person commits assault as defined above and the offense is committed against a person the actor knows is a public servant while the public servant is lawfully discharging his official duty.” The application of the law to the facts section of the charge stated: “You must determine whether the State has proved from the evidence [that Enriquez assaulted Detective Chavarria and that Enriquez] did then and there know that [E.] Chavarria was a public servant, to wit:

a peace officer with the San Angelo Police Department.” After closing argument, the jury returned a verdict form that found Enriquez guilty of “the offense of assault on a public servant as charged in Count One of the indictment” and guilty of evading arrest with a prior conviction as charged in count two.

Enriquez pleaded true to an enhancement to the first charge, and after hearing punishment evidence, the trial court sentenced him to 75 years’ imprisonment. The judgment reflects that Enriquez was sentenced for assault on a peace officer. As to evading arrest, the court sentenced Enriquez to a concurrent 730 days’ confinement.

On appeal, Enriquez contends that he was indicted for one charge but tried and sentenced for a different charge. He argues that the trial court, the State, and defense counsel conducted the trial under the mistaken belief that he was indicted for the second-degree felony offense of assault on a peace officer, when in fact, he had been indicted for a third-degree felony offense of assault on a public servant. He contends that the trial court continued the mistaken belief with the jury charge and verdict and caused him egregious harm.

Alternatively, he argues that if the trial court’s charge was not fundamental error requiring reversal, his 75-year sentence was illegal because the sentencing range for third-degree felony assault on a public servant with one enhancement was 2 to 20 years’ imprisonment.

Indictment

Preliminarily, Enriquez argues that he was charged with the third-degree felony assault on a public servant, rather than the second-degree felony assault on a peace officer. We begin by reviewing the indictment.

The Texas Constitution guarantees defendants the right to indictment by a grand jury for all felony offenses. TEX. CONST. art. I, §10; *Riney v. State*, 28 S.W.3d 561, 564 (Tex. Crim. App. 2000). The indictment serves a dual purpose of protecting citizens against arbitrary accusations by the government and providing a defendant notice of the charged offense so he may prepare an effective defense. *Riney*, 28 S.W.3d at 565. The accused is not required to look elsewhere than the indictment for notice, and “it is not sufficient to say that the accused knew with what offense he was charged.” *Id.*; see also *Sierra v. State*, 501 S.W.3d 179, 183 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

To give proper notice, the indictment must state the offense charged in plain and intelligible language. See TEX. CODE CRIM. PROC. art. 21.02(7); *Riney*, 28 S.W.3d at 565. In most cases, a charging instrument that tracks the statutory text of an offense provides sufficient notice. *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008). When “an indictment facially charges a complete offense, it is reasonable to presume the State intended to charge the offense alleged, and none other.” *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994). Therefore,

when the indictment charges a complete offense, “the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense.” *Id.*; *see also Rodriguez v. State*, 18 S.W.3d 228, 232 (Tex. Crim. App. 2000) (conviction not authorized on theory not alleged in charging instrument). When analyzing the sufficiency of an indictment, “the critical determination is whether the trial court (and reviewing appellate courts) and the defendant can identify what penal-code provision is alleged.” *Kirkpatrick v. State*, 279 S.W.3d 324, 328 (Tex. Crim. App. 2009).

A person commits assault on a public servant if the person intentionally, knowingly, or recklessly causes bodily injury to a public servant while the public servant is lawfully discharging an official duty. *See* TEX. PENAL CODE § 22.01(b)(1). Assault on a public servant is a third-degree felony. *Id.*

Assault on a peace officer is defined as an offense committed “against a person the actor knows is a peace officer . . . while the officer . . . is lawfully discharging an official duty.” TEX. PENAL CODE § 22.01(b-2). It is a second-degree felony. *Id.*

The definition of a public servant includes a person “elected, selected, appointed, employed, or otherwise designated as . . . an officer, employee, or agent of government.” TEX. PENAL CODE § 1.07(a)(41)(A). The definition of a peace officer is more specific. A peace officer is “a person elected, employed, or appointed

as a peace officer under Article 2.12, Code of Criminal Procedure, Section 51.212 or 51.214, Education Code, or other law.” *Id.* § 1.07(a)(36).

In this case, the heading on the face of the indictment listed the appellant’s name, address, date of birth, and “SID” number. It listed two charges and their statutes: “Ct. 1 Assault Peace Officer/judge (§22.01(b-2)) . . . Second Degree Felony Enhanced to First Degree Felony” and “Ct. 2 Evading Arrest Det. W/prev Conviction (§38.04(b)(1)).”

Enriquez argues that the body of the indictment did not track the language for assault on a peace officer, and instead charged him with assault on a public servant.

The indictment reads:

The Grand Jurors for the County of Tom Green, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the January Term 2018 of the 119TH District Court of said County, upon their oaths present in and to said Court, that LEEROY ANTHONY ENRIQUEZ AKA LEROY ANTHONY ENRIQUEZ Defendant on or about the 26th day of February, 2018, and before the presentment of this indictment, in said County and State, did then and there intentionally, knowingly, and recklessly cause bodily injury to [E.] Chavarria, by grabbing with hands, striking with hand or hands, biting with mouth, and the defendant did then and there know that the said [E.] Chavarria was then and there a **public servant, to-wit: City of San Angelo Police Officer** and that the said [E.] Chavarria was then and there lawfully discharging an officially duty, to-wit: investigating a possible criminal trespass.

(emphasis added). Enriquez contends that because a reference to second-degree assault on a peace officer was not in this paragraph, the indictment only charged him with assault on a public servant.

The Court of Criminal Appeals has held that in reviewing the sufficiency of an indictment, courts must consider more than just the bare charging language in an indictment. *See Kirkpatrick*, 279 S.W.3d at 329 (holding defendant had notice she was charged with a third-degree felony when the heading of the indictment clearly indicated the State intended to charge “Indictment-Tampering with a Governmental Record 3rd Degree Felony” and listed the associated statute from the Penal Code). The heading of this indictment stated that Enriquez was charged with assault on a peace officer, which was a second-degree felony enhanced to a first-degree felony. It also listed the Penal Code statute defining the crime. Enriquez had adequate notice that he was charged with the commission of assault on a peace officer. *See Jenkins v. State*, 592 S.W.3d 894, 901–02 (Tex. Crim. App. 2018) (defendant had adequate notice that he was the person charged when the heading listed among other things his name, address, “SID” number, and specific offense charged even though his name did not appear in the charging language); *Kirkpatrick*, 279 S.W.3d at 329 (heading stating defendant was charged with “3rd Degree Felony” and listing Penal Code provision gave notice to defendant that she was charged with a felony rather than a misdemeanor).

Moreover, “if a defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post-conviction proceeding.” *Jenkins*, 592 S.W.3d at 902; *see also* TEX. CODE CRIM. PROC. art. 1.14(b). Texas law requires a defendant to object to any error in the indictment before the day of trial, and certainly before the jury is empaneled. *Jenkins*, 592 S.W.3d at 902 (quoting *Teal v. State*, 230 S.W.3d 172, 177 (Tex. Crim. App. 2007)). Enriquez waived any issue relating to the sufficiency of the indictment by failing to object prior to trial. *Jenkins*, 592 S.W.3d at 902. Enriquez’s argument in this regard is unavailing.

Error in the Jury Charge

Enriquez next argues that the jury charge was erroneous because it did not instruct the jury on the elements of assault on a peace officer.

We review an alleged jury charge error in two steps. First, we must determine if there is error in the charge, and second, if there is error, we evaluate whether sufficient harm resulted from the error to require reversal. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). If error occurred, the reviewing court must determine whether the appellant timely objected to the instruction. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh’g). If a timely objection

was made, reversal is required if there was some harm to the appellant. *Id.* When as here the appellant did not timely object to the jury instructions at trial, he must establish that the error was fundamental, causing him egregious harm such that he was deprived of a fair and impartial trial. *Id.* Errors resulting in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. *Warner v. State*, 245 S.W.3d 458, 461–62 (Tex. Crim. App. 2008). In evaluating whether an error resulted in egregious harm, courts consider the jury charge, the evidence, arguments of counsel, and any other relevant information in the trial record. *Gelinas v. State*, 398 S.W.3d 703, 705–06 (Tex. Crim. App. 2013).

Enriquez argues that because he was indicted for third-degree felony assault on a public servant, the trial court fundamentally erred by substituting a theory of the offense different from the theory alleged in the indictment that allowed for conviction of a second-degree felony. Specifically, he argues that the trial court erred when it its application charged on the element of “public servant, to-wit: a peace officer” rather than “public servant, to-wit a City of San Angelo police officer.” We have already held that the indictment was sufficient to charge Enriquez with second-degree felony assault on a peace officer, so we review for charge error for that offense.

The trial court must charge the jury on the “law applicable to the case,” which requires that the jury be instructed on each element of the offense charged. TEX. CODE CRIM. PROC. art. 36.14. The “law applicable to the case” also includes the statutory definitions that affect the meaning of the elements of the offense. *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011); *Villareal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009). Thus, a trial court is obliged to communicate to the jury each statutory definition that affects the meaning of an element of the offense. *Villareal*, 286 S.W.3d at 329. The court’s duty to instruct the jury on the “law applicable to the case” exists even when defense counsel fails to object to the charge. *Taylor v. State*, 332 S.W.3d 483, 486 (Tex. Crim. App. 2011). The trial court is “ultimately responsible for the accuracy of the jury charge and the accompanying instructions.” *Id.* at 488 (quoting *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007)).

The opening sentence as well as the first sentence of the “Accusations” section of the court’s charge state that Enriquez was charged with “the offense of assault on a public servant.” The “Accusations” section tracks the statutory language for assault on a public servant, stating that Enriquez was charged with causing bodily injury to Detective Chavarria who was “then and there a public servant, to wit: a City of San Angelo Police Officer” discharging an official duty. The “Relevant Statutes” section

that follows defines assault and assault on a public servant. The “Application of the Law to the Facts” states:

Now, therefore bearing in mind the foregoing definitions and instructions, you must determine whether the state has proved from the evidence beyond a reasonable doubt that on or about February 26, 2018, in Tom Green County, Texas, the defendant Leeroy Anthony Enriquez aka Leroy Anthony Enriquez did intentionally, knowingly or recklessly cause bodily injury to [E.] Chavarria by grabbing with hands, striking with hand or hands, biting with mouth and that the defendant did then and there know that **Chavarria was a public servant, to-wit: a peace officer with the San Angelo Police Department**, and that [E.] Chavarria was then and there lawfully discharging an official duty, to-wit: investigating a possible criminal trespass as alleged in Count One of the indictment.

(emphasis added). The jury returned a signed verdict form that stated, “We, the jury, find [Enriquez] **GUILTY** of the offense of assault on a public servant as charged in Count One of the indictment.”

The abstract portion of the charge did not define assault on a peace officer nor did it include the statutory definition of peace officer. *Villareal*, 286 S.W.3d at 329. We hold that the charge was erroneous because it did not define required elements for the jury. *Id.*

Having found error in the charge, we next review whether Enriquez was egregiously harmed by the error. *Warner*, 245 S.W.3d at 462. A review of the record presents an unusual situation where the indictment referenced assault on a peace officer but the record at trial suggests that the parties proceeded as if the appellant

was charged with assault on a public servant. As mentioned supra, the heading of the indictment stated that Enriquez was charged with assault on a peace officer and listed the relevant statute, but the charging paragraph did not use the words “peace officer” and instead used “public servant.” Before voir dire began, the trial court reviewed the charges with Enriquez and stated,

“You have been charged with two different counts. One is evading arrest and you have also been charged with assault on a peace officer. The assault on a peace officer charge is enhanced. It typically would be a second-degree felony with a range of punishment of 2 to 20 years possible. . . . It is enhanced to a range of 5 to 99 years. Do you understand that sir?”

Enriquez responded that he understood. After this point, with one exception in the State’s closing argument, neither party nor the trial court referred to the charge as assault on a peace officer.

At the beginning of voir dire, the State told potential jurors that there were two charges in the case, “the first is assault of a public servant.” Detective Chavarria testified that he had been a police officer for 24 years and that he was a certified peace officer. In closing, the State told the jury, “so your count one is assaulting a public servant,” but the State ended the closing argument with: “The evidence shows that the defendant is guilty beyond a reasonable doubt to count one, assault of a peace officer.”

Neither party disputes that Detective Chavarria was a police officer and a peace officer. To convict for assault on a peace officer, the jury was required to find that Enriquez (1) caused bodily injury (2) to Detective Chavarria (3) who was a peace officer with the San Angelo Police Department (4) discharging his official duties. *See* TEX. PENAL CODE § 22.01(b–2). The jury was instructed on the offense of assault on a public servant, which requires proof of bodily injury to a person who is a public servant executing his duties. *Id.* § 22.01(b)(1).

Police officers with a peace officer license are peace officers. *See* TEX. PENAL CODE § 1.07(a)(36) (defining peace officer to include those appointed under Article 2.12 of the Code of Criminal Procedure); TEX. CODE CRIM. PROC. art. 2.12(3) (stating police officers are peace officers). All police officers are public servants. TEX. PENAL CODE § 1.07(a)(41) (defining “public servant” as an officer of government). Enriquez also does not argue that the jury could have convicted him of assaulting a public servant who was not, specifically, a peace officer.

Because police officers are peace officers, and peace officers are public servants, the erroneous jury charge did not affect the basis of the case, deprive Enriquez of a valuable right, or vitally affect a defensive theory. *Warner*, 245 S.W.3d at 461–62; *Ngo*, 175 S.W.3d at 750. The basis of the case and theory of the case did not change as a result of the jury charge wording. Nothing in the record indicates that the lack of a definition would have confused the jury or caused the jury to

misapply the law. *See Plata v. State*, 926 S.W.2d 300, 302 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234, (Tex. Crim. App. 1997) (“[The] failure to give an abstract instruction is reversible only when such an instruction is necessary to correct or complete understanding of concepts or terms in the application part of the charge.”). The record does not reflect that the jury was confused by the conduct described in the charge, and the record clearly establishes that Detective Chavarria was a police officer and not any other kind of public servant.

In view of the jury charge submitted and the uncontroverted evidence regarding Detective Chavarria’s status as a police officer, we conclude that although the charge was erroneous, the error did not deny Enriquez a basic right or affect the basis of the case. *Warner*, 245 S.W.3d at 461–62; *Ngo*, 175 S.W.3d at 750. Enriquez did not suffer egregious harm. Accordingly, we overrule his second issue.

Sentence

In his final issue, Enriquez argues that his 75-year sentence was illegal because it was outside the sentencing range for an enhanced conviction for assault on a public servant. We have held that the court did not err in pronouncing judgment on the charge of assault on a peace officer. Assault on a peace officer is a second-degree felony. TEX. PENAL CODE § 22.01(b-2). The State alleged and Enriquez pleaded true to an enhancement, alleging that he had previously been convicted of a

felony, which enhanced the conviction to a first-degree felony. *Id.* § 12.42(b). The sentencing range for a first-degree felony is 5 to 99 years imprisonment. *Id.* § 12.32(a). The trial court's assessment of 75 years' imprisonment was within the range of punishment prescribed by law. We overrule Enriquez's final issue.

Conclusions

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

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