Opinion issued August 13, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00792-CR

THOMAS NATHANIEL O'DONNEL AKA THOMAS NATHANIEL O'DENNEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Tarrant County, Texas[1]
Trial Court Case No. 1513778D

MEMORANDUM OPINION

[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 19–9091 (Tex. Oct. 1, 2019); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases); TEX. R. APP. P. 41.3 ("In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court . . . .").

A jury found appellant, Thomas Nathaniel O'Donnel, also known as Thomas Nathaniel O'Dennel, guilty of the felony offense of driving while intoxicated ("DWI"),[2] third offense, and assessed his punishment at confinement for three years. In two issues, appellant contends that the trial court erred in instructing the jury on reasonable doubt and the trial court's judgment should be modified.

We modify the trial court's judgment and affirm as modified.

Background

Arlington Police Department Officer D. Gordon testified that on August 4, 2017, around 2:00 a.m., he was "doing [a] bar check at the Golden Nugget" on West Division Street in Tarrant County, Texas. While performing his "bar check" in the parking lot of the Golden Nugget, Gordon, a traffic DWI officer, heard "someone blowing their horn at another vehicle" and saw several cars driving on West Division Street. Gordon proceeded to drive his patrol car westbound on West Division Street to "see what[] [was] going on" and to "find out what they were blowing [their horn] at." As Gordon drove, he saw a 2009 Dodge Charger (the "car") weaving and swerving in between lanes, with the driver failing to control the car. Gordon activated his patrol car's emergency lights and initiated a traffic stop.

Officer Gordon testified that it took the driver of the car "a long time to pull over," and when the car did finally stop, Gordon saw the back of the car "dip" and

[2] *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(b).

the driver "jump from the driver's seat to the back passenger seat" of the car. According to Gordon, the driver of the car jumped from the front driver's seat, went "down the middle of the center of the vehicle," and got in the back-rear passenger seat.

Officer Gordon immediately exited his patrol car and approached the driver's side of the car, but no one was in the driver's seat. He saw a person, who had vomited and urinated on himself, in the front passenger seat with his seat belt on. Gordon looked in the back seat of the car and saw appellant laying on his side. When Gordon asked appellant, who was driving the car, appellant stated: "I was not driving the vehicle." (Internal quotations omitted.) But appellant did not tell Gordon that someone else had been driving the car either.

Officer Gordon next asked appellant to exit the car, but appellant refused. Gordon also asked appellant to perform certain standardized field sobriety tests, which appellant also refused to do. Eventually, Gordon had to pull appellant out of the car. Gordon arrested appellant and helped him walk to the patrol car because appellant's balance was unsteady. After appellant refused to consent to breath or blood testing, Gordon obtained a search warrant so that appellant's blood could be drawn. Gordon transported appellant to Medical City of Arlington to have his blood drawn.

In regard to who had been driving the car, Officer Gordon noted that there was vomit on top of the front passenger's seat belt, which indicated to Gordon that the passenger had been in that seat for a while. The driver seat also did not have any wet spots which made it unlikely that the front passenger, who had urinated on himself, had been sitting there. Further, based on the layout of the car, Gordon believed that it would have been difficult for a person to jump from the driver's seat to the front passenger seat and doing so would have "take[n] a great bit of time." In contrast, according to Gordon, there was a "clear[] path to jump from the driver's seat to the back of the vehicle since [there was] little obstruction in between [the driver's seat] and the back seat." And because Gordon had seen someone jump from the driver's seat into the back seat of the car and appellant was the only person found in the car's back seat, Gordon knew that appellant had been driving the car.

The trial court admitted into evidence a copy of Office Gordon's patrol car's dash-camera videotaped recording. While viewing the videotaped recording at trial, Gordon testified that appellant was "driving from the outside lane" and "[h]e then straddled two lanes, and then got to the inside lane, and then came back over again, straddled two lanes again, and then came back outside, where [he] then . . . hit a curb." Gordon stated that driving in such a manner was not "normal driving behavior."

The parties agreed to a Stipulation of Testimony that was admitted into evidence. The Stipulation of Testimony states that if Reina Davidson had been called to testify as a witness at trial, she would have testified truthfully that she, a forensic chemist, was an employee of NMS Labs and she had analyzed the blood sample drawn from appellant at Medical City of Arlington. She determined that appellant's blood-alcohol concentration ("BAC") was 0.199, plus or minus 0.015, grams of ethanol per 100 milliliters of blood. A copy of her Toxicology Supplemental Report listing appellant's BAC was also admitted into evidence.

Jury Charge Error

In his first issue, appellant argues that the trial court erred in instructing the jury on reasonable doubt because the instruction was redundant, confusing, and logically flawed.

We review complaints of jury-charge error under a two-step process. *See Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). First, we must determine whether error exists in the trial court's charge. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013). Second, if there is error, the court must determine whether the error caused sufficient harm to require reversal of the conviction. *Id.* If the defendant preserved error by timely objecting to the charge, an appellate court will reverse if the defendant demonstrates that he suffered some harm as a result of the

error. *Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009). If the defendant did not object at trial, we will reverse only if the error was so egregious and created such harm that the defendant did not receive a fair and impartial trial. *Id.* at 26.

Here, the trial court instructed the jury, in pertinent part:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a Defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> *The Prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the Defendant.*
>
> *It is not required that the Prosecution prove guilt beyond all possible doubt; it is required that the Prosecution's proof excludes all "reasonable doubt" concerning the Defendant's guilt.*
>
> In the event you have a reasonable doubt as to the Defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty[.]"

(Emphasis added.) Appellant, in his briefing, appears to complain about the two emphasized paragraphs from the trial court's charge.

In *Geesa v. State*, the Court of Criminal Appeals held that trial courts in all criminal cases must define reasonable doubt in their instructions to the jury and

mandated that a six-paragraph jury instruction on reasonable doubt be included in a trial court's charge. 820 S.W.2d 154, 161–62 (Tex. Crim. App. 1991), *overruled in part by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000); *see also Woods v. State*, 152 S.W.3d 105, 114–15 (Tex. Crim. App. 2004). That six-paragraph reasonable-doubt instruction mandated in *Geesa* stated as follows:

> [1] All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> [2] The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.
>
> [3] It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.
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> [4] A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.
>
> [5] Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

> [6] In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not guilty[.]"

Geesa, 820 S.W.2d at 162.

In *Paulson*, however, the Court of Criminal Appeals overruled the portion of *Geesa* that required trial courts in criminal cases to instruct juries on the definition of reasonable doubt. 28 S.W.3d at 570–73; *see also Woods*, 152 S.W.3d at 115; *Chiodo v. State*, No. 2-06-096-CR, 2007 WL 1952375, at *2 (Tex. App.—Fort Worth July 5, 2007, pet. ref'd) (mem. op., not designated for publication) (stating *Paulson* did not completely overrule *Geesa*). Instead, the Court of Criminal Appeals stated that "the better practice [would be] to give no definition of reasonable doubt at all to the jury," and it specifically criticized paragraphs [4] and [5] of the *Geesa* reasonable-doubt instruction. *Paulson*, 28 S.W.3d at 572–73; *see also Woods*, 152 S.W.3d at 115.

The trial court's instructions to the jury in this case are identical to paragraphs [1], [2], [3], and [6] of the reasonable-doubt instruction previously mandated by the Court of Criminal Appeals in *Geesa*. *Cf.* 820 S.W.2d at 162. Here, appellant challenges the trial court's inclusion of paragraphs [2] and [3] in its charge to the jury.

The Court of Criminal Appeals has held that when a trial court's instruction to the jury on reasonable doubt excludes the criticized paragraphs [4] and [5] from

Geesa, the trial court does not err by including the remaining reasonable-doubt paragraphs from *Geesa*. *See Woods*, 152 S.W.3d at 115; *see also Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010). And the Fort Worth Court of Appeals has specifically held that the trial court does not err in including paragraphs [2] and [3] from *Geesa* in its charge to the jury. *See Chiodo*, 2007 WL 1952375, at *1–3; *see also Stone v. State*, No. 02-14-00154-CR, 2015 WL 831424, at *2–3 (Tex. App.—Fort Worth Feb. 26, 2015, no pet.) (mem. op., not designated for publication) (holding trial court did not err in including paragraph [3] of *Geesa* instruction); *Lara v. State*, No. 2-09-199-CR, 2010 WL 2813522, at *2 (Tex. App.—Fort Worth July 15, 2010, no pet.) (mem. op., not designated for publication) (explaining only paragraphs [4] and [5] from *Geesa* were criticized); *Frank v. State*, 183 S.W.3d 63, 79 (Tex. App.—Fort Worth 2005, pet. ref'd); *Best v. State*, 118 S.W.3d 857, 865 (Tex. App.—Fort Worth 2003, no pet.).

Based on the foregoing, we hold that the trial court did not err in including the complained-of paragraphs in its charge to the jury.

We overrule appellant's first issue.

Modification of Judgment

In his second issue, appellant argues that the trial court's judgment of conviction for the felony offense of DWI, third offense, should be modified to "delet[e] the $100 fee assessed" for "Emergency Medical Services" under Texas

Code of Criminal Procedure article 102.0185[3] because the Fort Worth Court of Appeals has declared the prior version of the statute permitting the fee, which is applicable in this case, facially unconstitutional.[4] *See Casas v. State*, 524 S.W.3d 921, 925–27 (Tex. App.—Fort Worth 2017, no pet.); *see also Richardson v. State*, --- S.W.3d ---, ---, 2020 WL 2201111, at *6–7 (Tex. App.—Houston [1st Dist.] May 7, 2020, pet. filed) (agreeing with Fort Worth Court of Appeals and declaring former version of Texas Code of Criminal Procedure article 102.0185 unconstitutional).[5] The State "concedes that [a]ppellant was wrongly charged an

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[3] A criminal defendant may challenge the imposition of mandatory court costs for the first time on direct appeal when those costs are not imposed in open court and the judgment does not contain an itemization of the imposed court costs. *See London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016); *see also Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Casas v. State*, 524 S.W.3d 921, 925 (Tex. App.—Fort Worth 2017, no pet.).

[4] The Texas Legislature has amended Texas Code of Criminal Procedure article 102.0185, but the changes do not apply to a conviction before the effective date of the amendment. *See Richardson v. State*, No. 02-18-00508-CR, 2019 WL 4048879, at *3 n.1 (Tex. App.—Fort Worth Aug. 28, 2019, pet. ref'd) (mem. op., not designated for publication); *see also* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 2.38, 2019 Tex. Sess. Law. Serv. Ch. 1352 (current version at TEX. CODE CRIM. PROC. ANN. art. 102.0185).

[5] *See also Tadeo v. State*, Nos. 14-19-00113-CR, 14-19-00116-CR, 2020 WL 2991517, at *4 (Tex. App.—Houston [14th Dist.] June 4, 2020, pet. filed) (mem. op., not designated for publication); *Deaver v. State*, No. 07-18-00370-CR, 2020 WL 560581, at *5 (Tex. App.—Amarillo Feb. 4, 2020, pet. filed) (mem. op., not designated for publication); *Robison v. State*, No. 06-17-00082-CR, 2017 WL 4655107, at *4–5 (Tex. App.—Texarkana Oct. 18, 2017, pet. ref'd) (mem. op., not designated for publication).

'Emergency Medical Services' fee" and agrees that the trial court's judgment should be modified accordingly.

A trial court, in a judgment of conviction, must order the criminal defendant to pay court costs. *See* TEX. CODE CRIM. PROC. ANN. art. 42.16 (applicable when punishment is anything "other than a fine"); *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *Robinson v. State*, 514 S.W.3d 816, 827 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The former version of Texas Code of Criminal Procedure article 102.0185, titled "Additional Costs Attendant to Intoxication Convictions: Emergency Medical Services, Trauma Facilities, and Trauma Care Systems," authorized the imposition of a $100 court cost upon conviction of an intoxication offense to be allocated for emergency-medical services, trauma facilities, and trauma-care systems. *See* Act of June 1, 2003, 78th Leg., R.S., ch. 1213, § 4, 2003 Tex. Sess. Law Serv. Ch. 1213, *amended by* Act of May 5, 2011, 82nd Leg., R.S., ch. 91, § 6.007, 2011 Tex. Sess. Law Serv. Ch. 91; *see also Casas*, 524 S.W.3d at 925–26.

Here, the trial court, in its written judgment, ordered appellant to pay $504 in court costs. The Bill of Cost reflects that included within the $504 court-cost total is a cost of $100 for "Emerg Med Serv."

This Court may reform a trial court's judgment of conviction to delete court costs or fees when they are improperly assessed against a defendant. *See Cates v.*

State, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013); *Pyle v. State*, Nos. 01-18-00275-CR, 01-18-00276-CR, 2018 WL 4781078, at *4 (Tex. App.—Houston [1st Dist.] Oct. 4, 2018, pet. ref'd) (mem. op., not designated for publication); *see also* TEX. R. APP. P. 43.2(b); *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("[A]ppellate court[s] ha[ve] the power to correct and reform a trial court judgment . . . ."). Thus, we modify the trial court's judgment to subtract the $100 "Emergency Services Fee" from the total court costs assessed against appellant, such that the total amount of court costs in the judgment is $404. *See* TEX. R. APP. P. 43.2(b); *Cates*, 402 S.W.3d at 252 (holding proper remedy when trial court erroneously includes amounts as court costs is to modify judgment to delete erroneous amounts); *Meadway v. State*, No. 02-17-00051-CR, 2018 WL 6215850, at *5 (Tex. App.—Fort Worth Nov. 29, 2018, no pet.) (mem. op., not designated for publication) ("The proper remedy is to modify the judgment by subtracting the $100 EMS fee from the total costs assessed in the judgment."); *see also Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (courts of appeals have authority to modify a judgment).

We sustain appellant's second issue.

Conclusion

We affirm the judgment of the trial court as modified.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.

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