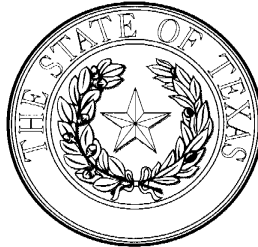


Opinion issued July 28, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-18-00539-CR

CHRISTOPHER SIMMS, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1591795**

MEMORANDUM OPINION ON REMAND

A jury convicted appellant Christopher Simms of aggravated assault causing serious bodily injury, and, after finding two enhancement allegations true, it assessed punishment of 45 years in prison. On appeal, Simms argues that the trial court erred by not instructing the jury on the lesser-included offense of deadly

conduct. On original submission, this Court affirmed the trial court's judgment, finding that the court's charge contained no error. *Simms v. State*, No. 01-18-00539-CR, 2019 WL 5996378, at *1 (Tex. App.—Houston [1st Dist.] Nov. 14, 2019) (mem. op., not designated for publication), *rev'd*, 629 S.W.3d 218 (Tex. Crim. App. 2021). On petition for discretionary review, a majority of the Court of Criminal Appeals reversed, holding that the trial court erred by failing to instruct the jury on the lesser-included offense of deadly conduct. *See Simms v. State*, 629 S.W.3d 218, 219 (Tex. Crim. App. 2021). The Court of Criminal Appeals remanded the appeal to this Court to conduct a harm analysis.

Because we conclude that the failure to instruct the jury on the class A misdemeanor offense of deadly conduct caused Simms some harm, we reverse the trial court's judgment and remand for a new trial.

Background

This case is before us on remand from the Court of Criminal Appeals. The factual and procedural backgrounds of the case are fully discussed in the prior opinions of this Court and the Court of Criminal Appeals. *See Simms*, 629 S.W.3d at 219 (Court of Criminal Appeals); *Simms*, 2019 WL 5996378, at *1 (court of appeals). We do not repeat them here.

Analysis

Simms raised only one issue on appeal: the failure of the trial court to instruct the jury on the lesser-included offense of deadly conduct.

The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis. *Saunders v. State*, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992); *Nangurai v. State*, 507 S.W.3d 229, 234 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); see *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Under *Almanza*, we will reverse if the error in the court's charge resulted in some harm to the accused. See *Almanza*, 686 S.W.2d at 171; *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). “[T]he harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer.” *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005). “Thus, ordinarily, if the absence of the lesser-included offense instruction left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, some harm exists.” *Nangurai*, 507 S.W.3d at 234 (citing *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)).

In this case, the jury was instructed only on the charged offense of aggravated assault. *See* TEX. PENAL CODE §22.02. The jury thus had the sole option to convict Simms of the charged offense or to acquit him. In addition, Simms received a sentence of 45 years in prison. *See id.* (aggravated assault is ordinarily a second-degree felony); *id.* § 12.42 (enhancing punishment to that of first-degree felony on proof that defendant previously was convicted of felony); *id.* § 12.32 (punishment for first-degree felony is confinement for 5 to 99 years or life in prison). This 45-year sentence significantly exceeds the maximum term of imprisonment that Simms could have received if he had been convicted of the class A misdemeanor offense of deadly conduct, for which the maximum period of confinement is one year in jail. *See id.* § 12.21 (punishment for class A misdemeanor); *see Nangurai*, 507 S.W.3d at 235 (holding that imposition of penalty that is more severe than potential maximum penalty for requested lesser-included offense is evidence of some harm).

We sustain Simms's sole issue.

Conclusion

We reverse the judgment of the trial court, and we remand this case for a new trial.

Peter Kelly
Justice

Panel consists of Justices Kelly, Hightower, and Countiss.

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