Affirmed and Memorandum Opinion filed February 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00816-CR

JESSE RALPH DAINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1381491

M E M O R A N D U M O P I N I O N

A jury convicted appellant Jesse Ralph Daines of aggravated sexual assault by intentionally or knowingly causing the penetration of the complainant's mouth with appellant's sexual organ. Appellant challenges his conviction in a single issue concerning unobjected-to jury charge error. We hold that appellant has not suffered egregious harm, and we affirm.

I. JURY CHARGE

Appellant contends the trial court erroneously defined the culpable mental states of "intentionally" and "knowingly" for aggravated sexual assault—a "nature of conduct" offense—by using the definitions applicable to "result of conduct" offenses. The State, without explicitly conceding error, addresses only the harm analysis. Assuming without deciding that the jury charge was erroneous, we agree that appellant has not suffered egregious harm.[1]

A. Alleged Error

Section 6.03 of the Penal Code defines "intentionally" and "knowingly" in light of "two possible conduct elements—nature of the conduct and result of the conduct." *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015). The relevant parts of the statute appear as follows:

> (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct . . . when he is aware of the nature of his conduct . . . . A person acts knowingly, or with knowledge, with

[1] The State suggests the law is "unsettled" regarding whether aggravated sexual assault is a nature-of-conduct or result-of-conduct crime, citing several decisions from our sister courts. *See, e.g.*, *Reed v. State*, 421 S.W.3d 24, 27–29 (Tex. App.—Waco 2013, pet. ref'd) (noting the unsettled state of the law, but concluding that aggravated sexual assault is a nature-of-conduct offense and not a result-of-conduct offense). Decisions from the Court of Criminal Appeals suggest that aggravated sexual assault is a nature-of-conduct crime. *See Young v. State*, 341 S.W.3d 417, 423 & n.22 (Tex. Crim. App. 2011) ("'By specifying the "nature of the conduct" prohibited (having sexual intercourse) the Legislature indicated rape is a "nature of conduct" crime and the required culpability must go to that element of conduct.'" (quoting *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985))); *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010) ("[T]he aggravated sexual assault statute defines a 'conduct-oriented' crime." (citing *Vick v. State*, 991 S.W.2d 830, 832 (Tex. Crim. App. 1999))).

> respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tex. Penal Code Ann. § 6.03(a)–(b).

Here, the trial court included only the definitions for a result-of-conduct offense, as follows:

> A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"In a jury charge, the language in regard to the culpable mental state must be tailored to the conduct elements of the offense." *Price*, 457 S.W.3d at 441. Thus, "[i]f the gravamen of an offense is the result of conduct, the jury charge on culpable mental state should be tailored to the result of conduct and likewise for nature-of-conduct offenses." *Id.*

We assume for argument's sake that the trial court should have included the nature-of-conduct definitions rather than the result-of-conduct definitions in this aggravated sexual assault case. *See Young*, 341 S.W.3d at 423 & nn.21–22 (noting that aggravated sexual assault is a nature-of-conduct offense for purposes of jury unanimity and double jeopardy); *see also Price*, 457 S.W.3d at 444 (Yeary, J., concurring) (noting that aggravated sexual assault is a nature-of-conduct offense for purposes of defining the culpable mental states).

B. Principles for Egregious Harm

Appellant concedes that his trial counsel did not object to the result-of-conduct definitions in the jury charge and the record must be reviewed for egregious harm. *See, e.g.*, *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App.

2005). Jury charge error is egregiously harmful if the error affects the very basis of the case, deprives the defendant of a valuable right, vitally affects the defensive theory, or makes a case for conviction clearly and significantly more persuasive. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011). The harm must be actual, not just theoretical. *See id.* This is a high and difficult standard to meet. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). In making this determination, we review the entire record, including (1) the arguments of counsel; (2) the entirety of the evidence, including the contested issues and weight of the probative evidence; (3) the remainder of the jury charge; and (4) any other relevant factors revealed by the record. *E.g.*, *Hollander v. State*, 414 S.W.3d 746, 749–50 (Tex. Crim. App. 2013).

C. Analysis

Appellant argues that he suffered egregious harm because his "testimony made the culpable mental state a contested issue," and "intent was the only contested issue, and appellant's sole defense." We disagree with appellant's contention.

Although appellant testified that he blacked out and could not remember the assault, trial counsel virtually conceded guilt during his brief opening and closing arguments. During opening arguments, counsel anticipated the trial court would give a lesser-included instruction for sexual assault. Counsel told the jury, "I suggest that's what the Defendant is guilty of. It happened. He did it. . . . It was very serious." Counsel explained that appellant's focus would be on the punishment stage of trial: "It was a very horrible incident, and there'll be a second stage of this trial. You'll find out exactly how and why it happened and what led to this stage of the Defendant's life." Similarly, during closing arguments, counsel essentially conceded guilt: "I've been around long enough, I don't think you're

going to find him not guilty and have him avoid responsibility." Counsel stressed that his focus would be on the punishment phase of trial: "I'll have a lot more to speak about in the sentencing stage of trial. . . . But I promise there will be a lot more information coming at you in the next stage." Counsel planted the seed of this strategy during voir dire when he acknowledged that voluntary intoxication was not a defense to sexual assault but then suggested the jurors could consider intoxication "as mitigating evidence on punishment." Accordingly, whether appellant was aware of the nature of his conduct or had the conscious objective or desire to engage in the conduct was not seriously contested at trial. This fact weighs against a finding of harm. *Cf. Collins v. State*, 2 S.W.3d 432, 436–37 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (no egregious harm from the lack of a reasonable doubt instruction concerning extraneous offenses during the punishment phase because "counsel virtually conceded its truth" during closing arguments).

The probative weight of the evidence was also strong. Appellant testified that he had never blacked out from drinking before, although he consumed copious amounts of alcohol daily. And, he remembered other details immediately preceding the assault, including the bar at which he assaulted the complainant being unusually crowded, the power going out, patrons filtering out of the bar and going home, and he had a few drinks with the complainant and another gentleman. Appellant recalled that initially the complainant did not want to drink "straight shots" but preferred an energy drink. The other gentleman, whom appellant identified by name, offered her an energy drink from the cooler in his truck. So, appellant testified about going outside to the truck to help find the energy drink in the cooler; he recalled putting his hand into the ice "a couple of times," pulling out some beers, and, on the third or fourth try, locating the energy drink.

The jury also heard from the complainant, a bartender, who testified that appellant was the last customer on the night of the assault. He took her cell phone, punched her in the face, cut her hand with a pocket knife, dragged her to a small restroom, forced her to perform oral sex on him for about six hours, repeatedly beat her, and repeatedly said he was going to kill her—in particular, "he was going to slit [her] throat open while he came down it." After she was able to crack him over the head with the lid of the toilet tank, he forced her to clean up most of the blood. But she purposefully did not clean it all up. He forced her to drive them to his hotel, where he made her take a shower to clean off the profuse amount of blood that had covered her from head to toe. She escaped after he fell asleep, sometime around 5:00 a.m. or 6:00 a.m., and a hotel employee called the police. The complainant testified that appellant had not seemed intoxicated, and he was very calm and calculating. Shortly before they had left the bar, he even reminded the complainant about the subject of a conversation from earlier in the night that the complainant had with her boss. The weight of the probative evidence, in light of the contested issues, weighs against a finding of harm.

Again, reviewing the arguments of counsel, neither party emphasized the alleged erroneous language of the jury charge, and appellant never urged an acquittal based on a lack of mens rea. This fact weighs against a finding of harm. *See Delgado v. State*, 944 S.W.2d 497, 499 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (no egregious harm when the charge included both result- and nature-of-conduct definitions for a result-of-conduct offense because, in part, the State did not emphasize the nature-of-conduct language during its jury argument); *cf. Jourdan v. State*, 428 S.W.3d 86, 98 (Tex. Crim. App. 2014) (noting that whether the parties emphasized the error during arguments is "obviously an

important consideration in any analysis of egregious harm"; finding no egregious harm even though the State emphasized the error during arguments).

Further, we note that the application paragraph of the jury charge correctly indicated that the culpable mental states applied to the nature-of-conduct element. The application paragraph instructed the jury to convict appellant if, among other things, he "intentionally or knowingly cause[d] the penetration of the mouth of [the complainant] by the sexual organ of the defendant." This fact weighs against a finding of harm. *Cf. Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999) (no egregious harm in this conviction for capital murder, a result-of-conduct offense, when the charge included both abstract definitions but the application paragraph correctly instructed the jury to convict if the defendant "intentionally or knowingly caused the death" of the complainant; "Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious").

Neither appellant nor the State cite any factually analogous cases addressing harm when a charge included a result-of-conduct instruction for a nature-of-conduct offense. But we note that Judge Yeary's concurring opinion in *Price* is persuasive. Rather than find no error when the jury charge included only result-of-conduct definitions for a family-violence assault committed by "impeding the normal breathing or circulation of the blood," Judge Yeary would have affirmed due to a lack of egregious harm from the failure to include nature-of-conduct definitions. *See* 457 S.W.3d at 445–46 (Yeary, J., concurring). Judge Yeary reasoned that the difference between the nature-of-conduct and result-of-conduct definitions would have been "negligible." *Id.* at 445. It was "hard to imagine a jury that would find that Appellant intentionally, knowingly, or recklessly caused an impediment to the victim's breath or blood flow but would also fail to find that

he intentionally or knowingly engaged in conduct that impeded those bodily functions." *Id.* at 446.

A similar rationale applies here. It would be hard to imagine a jury that would (1) convict appellant under the result-of-conduct definitions—finding that appellant had a conscious objective or desire to "cause the result" of penetrating the complainant's mouth with his sexual organ, or that he was "aware that his conduct [was] reasonably certain to cause" such penetration—but (2) acquit appellant under the nature-of-conduct definitions—refusing to find that appellant had a conscious objective or desire to "engage in the conduct" of penetrating the complainant's mouth with his sexual organ, or refusing to find that he was "aware of the nature of his conduct." In simpler terms, if the jury believed appellant was aware that his conduct was reasonably certain to cause the result, the jury similarly would have believed that appellant was aware of the nature of his conduct. This case, therefore, is distinguished from ones where the charge included nature-of-conduct definitions for result-of-conduct crimes. *See Alvarado v. State*, 704 S.W.2d 36, 39–40 (Tex. Crim. App. 1985) (finding reversible error in this injury-to-a-child case because including the nature-of-conduct definitions for this result-of-conduct crime authorized a conviction if the appellant knowingly or intentionally placed the child in a tub of hot water without requiring a finding that she intended or knew serious bodily injury would result); *Chaney v. State*, 314 S.W.3d 561, 573 (Tex. App.—Amarillo 2010, pet. ref'd) (finding reversible error in a murder case because including the nature-of-conduct definitions for this result-of-conduct crime authorized the jury to convict the defendant of murder based solely on a belief that he knowingly or intentionally engaged in extremely dangerous conduct of wresting a loaded firearm away from the victim, without finding that the appellant intended or knew that death would result).

The record in this case does not reveal that the alleged charge error affected the very basis of the case, deprived appellant of a valuable right, vitally affected any defensive theory, or made a case for conviction clearly and significantly more persuasive.

Appellant's sole issue is overruled.

II. CONCLUSION

Having overruled appellant's sole issue on appeal, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.
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