

Affirmed and Memorandum Opinion filed June 17, 2021.



In The

Fourteenth Court of Appeals

NO. 14-20-00286-CR

DANIEL GLENN OSTRANDER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 30th District Court
Wichita County, Texas
Trial Court Cause No. 56,171-A**

MEMORANDUM OPINION

In this appeal from two separate convictions, we consider seven complaints of alleged charge error, and one additional complaint relating to a deadly weapon finding. For the reasons given below, we overrule all of these complaints and affirm the trial court's judgments.

BACKGROUND

The offenses in this case occurred in a correctional facility, where appellant was already serving time in a segregated unit reserved for more troublesome inmates. Two correctional officers approached appellant's cell and unlocked the "bean slot," which is the opening in the cell door that is used for passing food and drinks. When one officer attempted to deliver appellant his lunch, appellant used a makeshift instrument to cut the officer's arm. The instrument was a razor blade attached to a ballpoint pen.

Appellant was charged with one count of aggravated assault of a public servant, and another count of possession of a deadly weapon in a penal institution. Appellant pleaded not guilty to both counts, and his case proceeded to a trial by jury, where he represented himself. The jury found him guilty of both counts, and the trial court assessed punishment for each count at life imprisonment.

CHARGE ERROR COMPLAINTS

I. Application Paragraphs

Appellant's first challenge relates to the application paragraphs in the jury charge, which we reproduce here:

For Count 1, you must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in Wichita County, Texas, on or about the 17th day of November, 2014, caused bodily injury to [the complainant];
2. the defendant did this—
 - a. intending to cause bodily injury; or
 - b. knowing that he would cause bodily injury; or
 - c. with recklessness about whether he would cause bodily injury;

3. the defendant, during the alleged assault, used or exhibited a razor blade attached to a handle, a deadly weapon;
4. the defendant knew [the complainant] was a public servant at the time of the assault; [and]
5. [the complainant] was discharging an official duty in supervising inmates in custody at the Texas Department of Criminal Justice.

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty” of aggravated assault of a public servant.

For Count 2, you must determine whether the state has proved, beyond a reasonable doubt, [four] elements. The elements are that—

1. the defendant, in Wichita County, Texas, on or about the 17th day of November, 2014, while confined in a penal institution;
2. possessed a deadly weapon in said penal institution;
3. the defendant did this—
 - a. intending to possess a deadly weapon; or
 - b. knowing that he possessed a deadly weapon; [and]
4. the weapon was a razor blade attached to a handle.

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty” of [possession of a] deadly weapon in a penal institution.

Appellant criticizes these application paragraphs because they contained an affirmative instruction for when the jury must find him guilty, but no opposite instruction for when the jury must find him not guilty. Though he made so such request during the charge conference, appellant asserts that the trial court should have given the following instruction after each application paragraph: “Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict ‘Not Guilty.’”

We review a complaint of charge error under a two-step process, considering first whether error exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App.

2005). If error does exist, we then analyze that error for harm under the procedural framework of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

Appellant contends that the omitted instruction amounts to error under several court decisions, but all of his cited authorities deal with unrelated matters, such as the requirements of a self-defense instruction, or the requirements of a verdict form. *See, e.g., Mendez v. State*, 545 S.W.3d 548, 554 (Tex. Crim. App. 2018) (holding that the trial court errs when it fails to apply a self-defense instruction to the facts of the case); *Jennings v. State*, 302 S.W.3d 306, 310 (Tex. Crim. App. 2010) (holding that the trial court errs when it submits a verdict form that omits any guilty or not guilty option available to the jury). Appellant also refers to the pattern jury charges, but he notes that the instructions there are merely “instructive.”¹

We are not aware of any authority establishing that the omitted instruction is required. Nor can we say that the omitted instruction was necessary in this particular case because the jury was already fully advised under the charge as given about the circumstances in which it must acquit. For example, the “General Principles” section of the charge instructed the jury as follows: “If the state does not prove every element of the offense beyond a reasonable doubt, then you must find the defendant not guilty.” This general instruction captures the very essence of the omitted instruction. Consistent with that general instruction, the verdict forms contained options for finding appellant “not guilty.” The charge also had other instructions stating that the prosecution had the burden of proof and that the presumption of innocence was sufficient by itself for an acquittal. Based on these provisions, and on the absence of

¹ One of the model instructions for aggravated assault provides as follows: “If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of [the elements] listed above, you must find the defendant ‘not guilty.’” Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property § 85.6, at 232 (2020).

authority to the contrary, we conclude that the trial court did not err by submitting a charge without the omitted instruction.

II. “Accusation”

Appellant’s next challenge focuses on a section of the charge entitled “Instructions of the Court.” This section begins with two subheadings for “Accusation Count 1” and “Accusation Count 2,” which both contain language that tracks the indictment. Following that language, the trial court instructed the jury on the burden of proof. The instruction stated as follows: “The state must prove, beyond a reasonable doubt, the accusation of aggravated assault against a public servant and possession of a deadly weapon in a penal institution.”

Appellant did not object to this instruction, but he now challenges it on the grounds that the trial court used the word “accusation” instead of the word “elements.” Appellant contends that this choice of words misled the jury because other provisions of the charge used the word “elements,” as in the application paragraphs recited above. He also contends that the jury could have misconstrued the word “accusation” in such a way that the jury “could fail to find one of the elements beyond a reasonable doubt but still convict.”

The only authority that appellant cites in support of this argument is *Mann v. State*, 964 S.W.2d 639 (Tex. Crim. App. 1998), but that case is not analogous. The charge there erroneously omitted the words “do not,” which effectively permitted a conviction even if the jury had a reasonable doubt as to whether the prosecution had proven one of the essential elements of the offense. *Id.* at 641. By contrast, the charge here suffers from no such omission.

We do not believe that the word “accusation” created any potential for conviction in the event that the jury had a reasonable doubt regarding one of the

essential elements. As we explained in the previous section of this opinion, the charge contained another instruction expressly stating that the jury must acquit if the prosecution did not prove every essential element beyond a reasonable doubt. Similarly, the application paragraphs enumerated each essential element of the offense, and those paragraphs ended with an instruction stating that the jury must find appellant guilty if the jury found that all of those elements were proven beyond a reasonable doubt. There was no ambiguous language or provision authorizing a conviction in the face of reasonable doubt.

We also observe that the trial court followed the model instruction drafted by the committee on pattern jury charges, which also uses the word “accusation” instead of the word “elements.” *See, e.g.*, Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property § 85.6, at 230 (2020) (“The state must prove, beyond a reasonable doubt, the accusation of aggravated assault.”). The trial court did not err by submitting a charge that tracked this model instruction.

III. “Serious Bodily Injury”

Both of the charged offenses required proof of a deadly weapon, which is a statutorily defined term. *See* Tex. Penal Code § 1.07(a)(17). The trial court instructed the jury on the meaning of that term, although the trial court did not give the jury a verbatim copy of the statutory definition. Instead, the trial court rephrased the statutory definition (which we address in a related issue below). In pertinent part, the trial court instructed the jury that a deadly weapon was “anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury.”

This last phrase, “serious bodily injury,” is another statutorily defined term. It means “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of

any bodily member or organ.” *See* Tex. Penal Code § 1.07(a)(46). The trial court did not rephrase this statutory definition. Instead, the trial court omitted the definition entirely, and appellant now contends that the omission was erroneous.

The trial court has a statutory obligation to instruct the jury on “the law applicable to the case.” *See* Tex. Code Crim. Proc. art. 36.14. That obligation “requires that each statutory definition that affects the meaning of an element of the offense must be communicated to the jury.” *See Villareal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009). Under this rule, the trial court was required to submit the statutory definition of the term “serious bodily injury,” and the trial court’s failure to do so was erroneous. *See Parsons v. State*, 191 S.W.3d 862, 864 (Tex. App.—Waco 2006, pet. ref’d).

Because appellant did not object to the omitted instruction, he could only obtain appellate relief if the trial court’s error caused him egregious harm. *See Almanza*, 686 S.W.2d at 171. Harm is egregious when the error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *See Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007). When deciding whether the defendant suffered egregious harm under this standard, we consider the entirety of the jury charge, the state of the evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole. *Id.*

The Jury Charge. The prosecution alleged in the indictment that appellant’s aggravated assault resulted in the complainant suffering ordinary bodily injury. Pursuant to that allegation, the trial court instructed the jury on the meaning of bodily injury, and that instruction tracked that term’s statutory definition. *See* Tex. Penal Code § 1.07(a)(8) (“‘Bodily injury’ means physical pain, illness, or any impairment of physical condition.”).

Appellant argues that he suffered egregious harm because this definition for bodily injury provided the jury with the only direction for understanding serious bodily injury. Appellant does not expand on this argument. Instead, he merely cites to *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017), *superseded by statute on other grounds as stated in Lopez v. State*, 600 S.W.3d 43 (Tex. Crim. App. 2020), which held that a charge error resulted in egregious harm because the jury was required to understand a statutory term, but the jury was only given guidance from a statute that was not the law applicable to the case. *Id.* at 339. *Arteaga* has no application here. That case dealt with issues pertaining to sexual assault and bigamy, not bodily injury or serious bodily injury. *Id.* (“Here, the jury had to understand what ‘prohibited from marrying’ meant, but its only direction was the consanguinity statute, which was not ‘law applicable to the case.’”). And the definition of bodily injury was the law applicable to this case because the prosecution specifically alleged that appellant caused bodily injury when he assaulted the complainant.

The Evidence. The jury saw photographs of the modified razor blade and of the complainant’s injury shortly after he was cut. The jury also heard testimony that the complainant did not even realize that he had been cut until the other correctional officer alerted him that he was bleeding. Though the incision was not life-threatening, it required five staples to close and it left a scar on the complainant’s arm. The complainant also testified that he regarded the razor blade as a deadly weapon, and that he knew that weapons like it have caused serious bodily injury or death.

Despite all of this evidence, appellant argues that a properly instructed jury would have rejected the prosecution’s allegation that the razor blade was a deadly weapon. Appellant seems to base this argument on the evidence showing that the complainant’s wound was not serious, that appellant had a limited opportunity

behind a cell door to inflict any injury at all, and that there was no specific testimony about how the razor blade was used. These points are not persuasive. A wound does not need to be inflicted before an instrument can be characterized as a deadly weapon. *See Davidson v. State*, 602 S.W.2d 272, 273 (Tex. Crim. App. 1980).

As the trial court instructed, an instrument can be a deadly weapon if it was made for the purpose of inflicting serious bodily injury. This criterion applies here. The jury saw that the razor blade was crudely attached to a ballpoint pen. Because the instrument was fashioned in a correctional facility, the prosecution characterized it as a “shank.” A rational jury would have recognized that the purpose of the shank was to seriously injure another person, rather than some innocuous purpose like shaving.

The Arguments of Counsel. The prosecution did not mention in either its opening or closing statements that the shank was capable of inflicting serious bodily injury. Appellant did not contest that issue either. Instead, he mostly argued that the allegations against him were fabricated, and that the complainant could not be believed because he contradicted himself about the existence of certain video evidence. Neither of those points had any bearing on whether the shank could be characterized as a deadly weapon.

Appellant still suggests that he suffered egregious harm though because the prosecution mentioned during voir dire that “this case won’t be dealing with serious bodily injury or death.” But the prosecution was referring to the complainant’s actual injury, which as we explained above, is not dispositive because a deadly weapon finding can be made without any injury at all. There was still overwhelming evidence that the shank was made for the purpose of inflicting serious bodily injury.

Considering the record as a whole, we cannot say that the omitted definition for serious bodily injury affected the very basis of the case, deprived appellant of a

valuable right, or vitally affected a defensive theory. We therefore conclude that the trial court's error was harmless.

IV. Appositional Phrasing

In his next issue, appellant challenges the manner in which the trial court described the third element in the first application paragraph. That element stated as follows: “the defendant, during the alleged assault, used or exhibited a razor blade attached to a handle, a deadly weapon.”

With this particular phrasing, the trial court identified the razor blade in apposition to “a deadly weapon.” Appellant treats that appositional phrasing as an assumption that the razor blade actually was a deadly weapon. He then argues that the assumption amounted to an improper comment on the weight of the evidence that effectively relieved the prosecution of its burden of proof. We disagree.

The trial court followed the model instruction. *See* Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property § 85.6, at 232 (2020) (“the defendant, during the alleged assault, used or exhibited a [*insert alleged deadly weapon*], a deadly weapon”). The trial court did not declare or assume that the razor blade was a deadly weapon. Instead, the trial court instructed that the prosecution had the burden of proving that appellant used a deadly weapon. The trial court also applied that law to the facts of the case by restricting the jury's consideration to the modified razor blade because no other instrument had been alleged in the indictment. The trial court finally instructed the jury in the remaining portion of the application paragraph to determine whether the prosecution had proven this essential element beyond a reasonable doubt.

We conclude that no error has been shown. *See McElroy v. State*, 528 S.W.2d 831, 834 (Tex. Crim. App. 1975) (holding that the trial court did not improperly

comment on the weight of the evidence where the trial court instructed the jury to determine whether the defendant had used “a deadly weapon, to wit: a knife”); *Villanueva v. State*, 194 S.W.3d 146, 157–58 (Tex. App.—Houston [1st Dist.] 2006) (holding that the trial court did not improperly comment on the weight of the evidence “by placing ‘a deadly weapon’ in apposition to ‘hands’ and ‘object’”), *rev’d on other grounds*, 227 S.W.3d 744 (Tex. Crim. App. 2007).

V. “Deadly Weapon” Definition

The term “deadly weapon” is statutorily defined as “(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” *See* Tex. Penal Code § 1.07(a)(17).

As we mentioned earlier, the trial court did not instruct the jury with a verbatim copy of this statutory definition. Instead, the trial court rephrased the definition by instructing the jury that a deadly weapon meant:

1. a firearm; or
2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
3. anything actually used by the defendant in a manner making it capable of causing death or serious bodily injury; or
4. anything that the defendant intended to use in a manner that if so used would make it capable of causing death or serious bodily injury.

Appellant argues that the trial court’s definition is erroneous because it does not comport with the statutory definition. We disagree. The trial court followed the model instruction. *See* Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property § 85.6, at 231 (2020). Even though the model instruction is not a verbatim match, it still provided a definition that was consistent with the statutory

definition. Accordingly, we conclude that there was no error. *See Ferguson v. State*, 699 S.W.2d 381, 386 (Tex. App.—Fort Worth 1985, pet. ref'd) (“Although it is generally the safer practice, we hold it is not imperative for the court to track the statute verbatim, if the language used is equivalent thereto, adequately defines the elements of the offense set forth in the indictment and does not misinform, confuse or mislead the jury.”).

VI. “Deadly Weapon” and “Weapon”

In the second application paragraph, the trial court instructed the jury that the offense had four elements, two of which are implicated in appellant’s next challenge. One of the elements stated that the defendant “possessed a deadly weapon in said penal institution,” and the other element stated that “the weapon was a razor blade attached to a handle.” Appellant did not object to this portion of the charge in the trial court, but he now argues that the varying use of “deadly weapon” and “weapon” was erroneous.

Appellant has not cited to any authority demonstrating that this kind of variance amounted to charge error. Even if we assumed for the sake of argument that the variance was erroneous, appellant did not suffer egregious harm. The character of the razor blade was not hotly disputed during the trial; there was uncontroverted testimony that it was a deadly weapon. Also, based on the charge as a whole, the jury could not have convicted appellant unless the jury determined that the razor blade was both a weapon and a deadly weapon. We conclude that error, if any, was harmless.

VII. “At the Time of the Assault”

In his next issue, appellant challenges the manner in which the trial court described the fourth element in the first application paragraph. That element stated

as follows: “the defendant knew [the complainant] was a public servant at the time of the assault.” As with his fourth issue relating to appositional phrasing, appellant targets the final phrase of this element and contends that the trial court assumed that an assault had actually occurred, which is an improper comment on the weight of the evidence.

We need not determine whether there was charge error. Assuming for the sake of argument that the charge was erroneous, appellant did not object, and the record does not support a finding that he was egregiously harmed because there was overwhelming evidence that the complainant was actually assaulted. There was photographic proof of the bloody incision across the complainant’s arm. There was also testimony that the incision required staples to close and that it left a scar.

Appellant suggests that the cumulative effect of multiple errors resulted in egregious harm, but the only other possible charge errors concerned whether the razor blade was made for the purpose of inflicting serious bodily injury, and relatedly, whether the razor blade was a deadly weapon. These issues, along with the occurrence of the assault, were not hotly disputed. We conclude that any charge error was harmless.

DEADLY WEAPON FINDING

In his final issue, appellant challenges whether there is legally sufficient evidence to support the jury’s deadly weapon finding, which was an essential element of both offenses.

In a sufficiency challenge, a reviewing court must determine whether a rational trier of fact could have found the essential elements of an offense beyond a reasonable doubt. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). Because appellant has challenged the proof relating to just a single element of both

offenses, we limit our review accordingly. *See* Tex. R. App. P. 47.1 (providing that the reviewing court must address “every issue raised and necessary to final disposition of the appeal”); *Burks v. State*, No. PD-0992-15, 2017 WL 3443982 (Tex. Crim. App. June 28, 2017) (per curiam) (op. on reh’g) (not designated for publication) (holding that a reviewing court should not address unbriefed elements in a sufficiency challenge because an analysis of those elements is not necessary to final disposition of the appeal). In deciding whether the deadly weapon element was proven beyond a reasonable doubt, we consider all of the evidence in the light most favorable to the verdicts. *See Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018).

To establish the deadly weapon finding, the prosecution had to prove that the modified razor blade was manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury, or that the modified razor blade was capable of causing death or serious bodily injury in the manner of its use or intended use. *See* Tex. Penal Code § 1.07(a)(17). The prosecution easily met this burden.

The evidence showed that appellant crushed the base of a ballpoint pen, and then he inserted a razor blade into that crushed base just far enough so that a half-inch portion of the razor blade remained exposed. The jury could have reasonably concluded that this instrument, which the prosecution characterized as a “shank,” was a deadly weapon by design. *See Thomas v. State*, 825 S.W.2d 758, 759–60 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (holding that there was legally sufficient evidence to support a finding that a prison shank was a deadly weapon by design).

Because there is legally sufficient evidence to support a finding that the instrument was a deadly weapon by design, we need not consider appellant’s remaining arguments that the instrument was not capable of causing serious bodily injury or death in its manner of use or intended use.

CONCLUSION

The trial court's judgments are affirmed.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Spain and Wilson. (Spain, J., concurring without opinion).

Do Not Publish — Tex. R. App. P. 47.2(b).