



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00325-CR

Gene Phillip **ROMERO**, Jr.
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CR8782
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: May 23, 2018

AFFIRMED

Gene Phillip Romero, Jr. was convicted by a jury of aggravated robbery. On appeal, Romero contends: (1) the jury charge erroneously instructed the jury that the complainant was a disabled person which was an element of the offense; and (2) the evidence is insufficient to prove the complainant was a disabled person. We affirm the trial court's judgment.

BACKGROUND

Kaitong Johnson, the complainant, testified he was seated at a table in the patio area of a Starbucks restaurant around 4:30 a.m. with his laptop open on the table. Romero approached

Johnson, sat across from him, and the two men engaged in small talk for a short time. When Romero first approached Johnson, Johnson moved his backpack between his feet because he was a little apprehensive. After the small talk ended, Romero walked away, and Johnson put his laptop in his backpack. Romero returned a short time later, and, as he began to sit down, pushed the table towards Johnson, grabbed Johnson's backpack, punched Johnson in the face, and ran away.

Johnson testified he was born with spina bifida and requires crutches to walk. Johnson stated he could not prevent Romero from grabbing his backpack because his legs are weak from his disability. He also stated his disability limits his mobility and prevents him from protecting himself like a "normal person." Johnson yelled at Romero to return the backpack, but Romero continued to run. Johnson called 911, and officers were dispatched to the area.

The officer who first arrived at the scene testified he noticed Johnson had crutches that are gripped around the wrist and used by people with permanent disabilities. Johnson told the officer he needed the crutches to walk.

Another officer patrolled the area around the scene of the offense, saw Romero standing by a backpack around the corner from the Starbucks, and apprehended him. The detective who arrived at the scene testified he also noticed Johnson needed crutches to help him stand and walk. The detective took Johnson to the location where Romero was apprehended, and Johnson identified Romero as the person who took his backpack.

Romero was charged with aggravated robbery, and a jury convicted him of the offense. Romero appeals.

JURY CHARGE

In his first issue, Romero contends the jury charge erroneously instructed the jury that the complainant was a disabled person which was an element of the offense. "[W]e review alleged charge error by considering two questions: (1) whether error existed in the charge; and (2) whether

sufficient harm resulted from the error to compel reversal.” *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005).

Romero was charged with the offense of aggravated robbery by committing the offense of robbery and causing bodily injury to a disabled person. *See* TEX. PENAL CODE ANN. § 29.03(a) (West 2011). A person commits the offense of robbery if the person, “in the course of committing theft ... and with intent to obtain or maintain control of the property,” “intentionally, knowingly, or recklessly causes bodily injury to another.” *Id.* at § 29.02(a)(1).

The abstract portion of the jury charge instructed the jury, “A person commits aggravated robbery if the person commits a robbery, as defined above, and causes bodily injury to another person if the person is a disabled person.” The jury charge also defined the term “disabled person” as meaning “an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.”¹ Finally, the application paragraph of the jury charge read as follows:

Now, *if* you find from the evidence beyond a reasonable doubt that on or about the 8th day of July, 2016, in Bexar County, Texas, the defendant, Gene Phillip Romero Jr[.], while in the course of committing theft of property and with intent to obtain or maintain control of said property, did intentionally, knowingly, or recklessly cause bodily injury to Kaitong Johnson, a disabled person by striking Kaitong Johnson with the hand of Gene Phillip Romero Jr[.], then you will find the defendant guilty of aggravated robbery as charged in the indictment.

(emphasis added).

Romero argues the application paragraph of the jury charge removed the issue of whether Johnson was a disabled person from the jury’s consideration because the charge “simply and explicitly label[ed]” Johnson a disabled person. The State responds “the word ‘*if*’ precedes all elements of the offense” and “properly instructed the jury they must find beyond a reasonable

¹ This definition is taken verbatim from the definition of “disabled person” in section 29.03(c) of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 29.03(c).

doubt everything that follows the ‘if’ in order to convict [Romero].” We agree with the State and hold the application paragraph is consistent with the abstract portion of the charge requiring the jury to find Johnson was a disabled person in order to find Romero guilty of the offense. *See Woodard v. State*, 294 S.W.3d 605, 607–08 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d);² *see also Acreman v. State*, No. 09-92-189 CR, 1993 WL 338626, at *2 (Tex. App.—Beaumont Aug. 25, 1993, pet. ref’d) (not designated for publication).³ Therefore, we conclude no error existed in the charge.

Even if we were to assume, however, that the application paragraph was erroneous, Romero did not object to the charge; therefore, we would not reverse his conviction unless the error resulted in egregious harm. *Ngo*, 175 S.W.3d at 743-44. “Errors that result 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.” *Id.* at 750 (internal quotations omitted). In determining whether egregious harm exists, we examine: “(1) the charge itself; (2) the state of the evidence including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any

² A person also commits the offense of aggravated robbery if the person commits robbery and causes bodily injury to a person who is 65 years of age or older. *See* TEX. PENAL CODE ANN. § 29.03(a). The jury charge in *Woodard* is similar to the charge in the instant case: “if you believe beyond a reasonable doubt that in Brazoria County, Texas on or about the 25th of July, 2007, the defendant VINCENT GOREE WOODARD, did then and there, acting alone or as a party as that term has been previously defined, while in the course of committing theft of property owned by T.B., and with intent to obtain or maintain control of said property, *intentionally or knowingly cause bodily injury to T.B., a person 65 years of age or older, by kicking T.B. with the defendant’s foot*; ... then you will find the defendant guilty of the offense of Aggravated Robbery as charged in the indictment.” 294 S.W.3d at 607-08 (emphasis in original); *see also Garcia v. State*, No. 01-06-01049-CR, 2008 WL 185492, at *3 (Tex. App.—Houston [1st Dist.] Jan. 17, 2008, pet. ref’d) (not designated for publication) (noting application paragraph of jury charge provided “Now, if you find that ... [appellant] did then and there unlawfully, while in the course of committing theft of property owned by [the complainant] and with intent to obtain or maintain control of the property, intentionally or knowingly cause[d] bodily injury to [the complainant], a person at least sixty-five years of age[,] by grabbing [the complainant’s] purse and dragging [the complainant] to the ground, then you will find [appellant] guilty of aggravated robbery.”)

³ In *Acreman*, the jury also was charged in a similar manner to the instant case: “[I]f you find from the evidence beyond a reasonable doubt that the defendant, Terry Mitchell Acreman, on or about the 7th day of August, 1991, in Montgomery County, Texas, did then and there while in the course of committing theft of property and with intent to obtain and maintain control of said property, intentionally or knowingly threaten or place Claude Huff, a disabled person, in fear of imminent bodily injury or death, then you will find the defendant guilty of the offense of aggravated robbery, as charged in the indictment.” 1993 WL 338626, at *2.

other relevant information revealed by the record of the trial as a whole.” *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006).

In this case, the abstract portion of the jury charge noted the offense of aggravated robbery is committed if a person commits a robbery “and causes bodily injury to another person if the person is a disabled person.” Furthermore, the jury charge included a definition of “disabled person” which would be superfluous if the jury was not required to find Johnson met that definition.⁴ The evidence established Johnson had spina bifida and could not stand or walk without crutches. Finally, during closing argument, the prosecutor noted the evidence presented regarding Johnson’s disability and stated, “[a]ll of that is evidence that we used to prove this case to you beyond a reasonable doubt.” In response, defense counsel argued there was no credible evidence that Johnson had spina bifida and further argued:

... He’s not a disabled person. The spina bifida issue becomes relevant because I think it’s on Page 2, a disabled person means an individual — you can see it right there (indicating). I ask that you discuss among yourselves, was there proof sufficient beyond a reasonable doubt to overcome the presumption of innocence in that regard? I submit no.

In rebuttal, the prosecutor argued:

And about Kaitong not being credible, about him not coming with any proof of spina bifida, that’s kind of a slap in the face. That’s insulting. To think one who has lived with spina bifida for 28 years from day one of their existence would come up here and lie to you about a disability that they have and that they would live with every single day. I think it’s obvious to all of you when he came in here that he has a disability. He has to use crutches to aide him in getting around.

The prosecutor then reviewed each element of the offense set forth in the application paragraph of the jury charge and further argued:

And the other person is disabled. Other person meaning the victim, Kaitong Johnson. He’s a disabled person. He was born with spina bifida. He has a mobility

⁴ The inclusion of this definition and the abstract portion of the jury charge make the jury charge in this case distinguishable from the jury charge considered by the Texas Court of Criminal Appeal in *Sanchez v. State*, 209 S.W.3d 117 (Tex. Crim. App. 2006), which Romero cites in his brief to support his assertion that the jury charge caused egregious harm.

issue. And in this charge it defines for you a disabled person. An individual with a mental, physical or developmental disability which makes it [sic] substantially unable to protect himself from harm. He told you he had a disability and that he came — he has mobility issues. He cannot protect himself. He even told you that his legs are not very strong so he would not have been able to get up to get his backpack if he wanted to. That's why he was calling to the guy, this guy here, the defendant, to bring his backpack back to him. He couldn't go after him and get it.

Having reviewed the charge as a whole, the evidence presented, and closing argument, we conclude that even if the jury charge contained the error claimed by Romero, the error did not result in egregious harm.

SUFFICIENCY OF THE EVIDENCE

In his second issue, Romero contends the evidence is legally insufficient to prove Johnson was a disabled person.

In reviewing the legal sufficiency of the evidence to support a conviction, we consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). We “defer to the jury’s credibility and weight determinations because the jury is the **sole** judge of the witnesses’ credibility and the weight to be given their testimony.” *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (emphasis in original).

As the jury was instructed, a disabled person “means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.” TEX. PENAL CODE ANN. § 29.03(c). Romero argues no evidence was presented to show Johnson was disabled. Romero further argues “[t]he back-pack of any able-bodied person could have been snatched in exactly the same manner, quite irrespective of how well that person walked.”

With regard to Johnson's disability, Johnson testified he had spina bifida, and two other witnesses testified Johnson needed crutches to stand and walk. Furthermore, the jury observed Johnson's need to use his crutches when he walked to the witness stand. With regard to whether a disability makes a person "substantially unable to protect himself," this court has stated such an inability is shown when the person "does not have the strength or mobility to defend himself as a fully abled person could." *Ross v. State*, No. 04-15-00211-CR, 2016 WL 1237897, at *4 (Tex. App.—San Antonio Mar. 30, 2016, pet. ref'd) (not designated for publication). In this case, Johnson testified he could not prevent Romero from grabbing his backpack because his legs are weak from his disability. Furthermore, Johnson's disability prevented him from chasing Romero. Accordingly, because Johnson did "not have the strength or mobility to defend himself as a fully abled person could," the evidence is legally sufficient to support the jury's verdict. *Id.*

CONCLUSION

The judgment of the trial court is affirmed.

Irene Rios, Justice

DO NOT PUBLISH