**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

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**NO. 09-10-00211-CR**

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**GARY WAYNE SMITH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 252nd District Court**
**Jefferson County, Texas**
**Trial Cause No. 08-04764**

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## MEMORANDUM OPINION

Gary Wayne Smith[1] appeals from his conviction for aggravated assault. *See* Tex. Penal Code Ann. § 22.02 (West 2011). On appeal, Smith argues the trial court erred by excluding and limiting his cross-examination of a witness through which he intended to demonstrate the witness's motivation in testifying against him. Smith also contends the jury charge allowed his conviction of a crime for which he had not been indicted. Finding no reversible error, we affirm the trial court's judgment.

[1]Gary Wayne Smith is also known as Gary Wayne Smith Jr., Gary Toussaint and Gary Doomes.

## Background

A jury convicted Smith for his role in the July 2008 shooting of Quinten Donatta. During Smith's trial, the State called Donatta to testify about the persons involved in the shooting. When the State finished its direct examination, Smith's attorney cross-examined Donatta, but did not ask the questions that Smith now complains he was not allowed to ask during the trial. After Smith's attorney passed the witness, the State's attorney briefly conducted a redirect examination. After that, Smith's attorney conducted a recross-examination and again did not ask the questions that concern Smith's complaint on appeal, concluding the recross with the statement, "No further questions." When Smith's attorney attempted to call Donatta during the presentation of his defense, the State objected, arguing that the testimony Smith desired to elicit, which concerned a pending charge against Donatta for driving while intoxicated (D.W.I.), was not admissible to impeach Donatta's testimony about the shooting. Outside the jury's presence, the trial court allowed Smith's attorney to question Donatta about the pending D.W.I. charge against him; Donatta testified that he had no agreement with the State concerning the pending charge. At that point, the trial court ruled, sustaining the State's objection to Smith's request to recall Donatta and to examine him about the pending D.W.I. charge.

## Analysis

In issue one, Smith argues the trial court erred in refusing to allow him to examine Donatta about Donatta's charge for D.W.I. Smith argues that the trial court's ruling violates his constitutional right to confrontation. However, at trial, Smith did not assert a Confrontation Clause violation; instead, Smith's attorney argued that Donatta's testimony was admissible to show that Donatta's pending case could be used to influence Donatta's testimony against Smith concerning the shooting. After the trial court heard Donatta deny the existence of any agreement concerning the pending D.W.I., the trial court sustained the State's objection.

With respect to Smith's Confrontation Clause argument, we note that a Confrontation Clause objection must be made in the trial court to preserve a Confrontation Clause complaint for review on appeal. *See Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004). "When a defendant's objection encompasses complaints under both the Texas Rules of Evidence and the Confrontation Clause, the objection is not sufficiently specific to preserve error." *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) (citing *Paredes*, 129 S.W.3d at 535). Because Smith failed to clearly articulate that the Confrontation Clause demanded the admission of Donatta's testimony, Smith's Confrontation Clause argument is unpreserved for our review. *See Reyna*, 168 S.W.3d at 179; Tex. R. App. P. 33.1(a)(1).

Additionally, Smith contends that the pending charge against Donatta is relevant to show Donatta's bias and motive for testifying on behalf of the State. Smith argues that a defendant in a criminal case may always cross-examine a witness concerning a pending criminal charge. Nevertheless, while a defendant is allowed great latitude in showing any fact, including pending charges, that would tend to establish bias upon the part of any witness testifying against him, trial courts have considerable discretion in determining how and when bias may be proven and in deciding whether collateral evidence is material for that purpose. *Chambers v. State*, 866 S.W.2d 9, 26-27 (Tex. Crim. App. 1993); *Gutierrez v. State*, 681 S.W.2d 698, 706 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) (citing *Spriggs v. State*, 652 S.W.2d 405, 407-08 (Tex. Crim. App. 1983)). The burden of showing the relevance of the proffered evidence rests on the proponent. *Chambers*, 866 S.W.2d at 26-27.

Here, the testimony contained in the record addressing Donatta's pending charge reflects that Donatta had no agreement with the State regarding a dismissal of the charge, and he had no expectation of leniency in return for his testimony against Smith. On this record, the trial court was entitled to conclude that Donatta's pending D.W.I. charge was not relevant on the question of Donatta's motivations in testifying. *See* Tex. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). With respect to the impeachment value

of the excluded testimony, we further note that the crime of driving while intoxicated is not a crime of moral turpitude. *See Shipman v. State*, 604 S.W.2d 182, 184 (Tex. Crim. App. 1980). Because the trial court could reasonably conclude that the existence of Donatta's D.W.I. charge concerned a collateral matter that had no value in impeaching Donatta's testimony about the shooting, we conclude the trial court did not abuse its discretion by sustaining the State's objection. *See Delamora v. State*, 128 S.W.3d 344, 364-65 (Tex. App.—Austin 2004, pet. ref'd).

Moreover, even if we were to conclude that the proffered testimony tended to show that Donatta had a bias or motive to testify against Smith, relevant evidence may be excluded if its probative value is substantially outweighed by the risks of unfair prejudice, confusion of the issues, potential to mislead the jury, or that the testimony would result in undue delay or the needless presentation of cumulative evidence. *See* Tex. R. Evid. 403. In this case, Smith attempted to recall Donatta after Donatta had already been fully examined and cross-examined, and Smith's attorney did not obtain the trial court's permission to recall Donatta as a witness during his presentation of the evidence. Since Smith sought to recall Donatta after stating that he had no more questions, the trial court could have decided that recalling Donatta on a matter collateral to the shooting to provide testimony that no quid-pro-quo existed for his testimony against Smith would risk an undue delay in the proceedings, risk causing confusion about the importance of the testimony to the shooting, and risk the jury taking the existence of Donatta's pending

charge out of context, as the questions to Donatta about the pending D.W.I. would not then be asked at the time the jury heard other evidence about Donatta's background. When the trial court disallowed the testimony about Donatta's pending D.W.I., the trial court did not state its reason for excluding the testimony. Because trial courts are entitled to balance Rule 403's considerations against the probative value of proffered testimony, a decision to allow or disallow impeachment evidence will not be reversed absent an abuse of the trial court's discretion. *See Chambers*, 866 S.W.2d at 26 ("Appellant presented no well-reasoned or specific argument supporting his request [to impeach the witness]. He demonstrated no clear or even insinuated benefit that the State was attempting to gain for him, and no theory of a connection between this undefined 'benefit' and the witness's testimony."); *see also* Tex. R. Evid. 403.

In this case, the trial court allowed Smith to question Donatta outside the presence of the jury about his pending D.W.I., a charge that did not arise in connection with the facts that led to Smith being charged with aggravated assault. Smith offered no evidence to refute Donatta's testimony that Donatta did not have a deal with the State concerning his pending D.W.I., and Smith offered no explanation to the trial court regarding why, in the face of Donatta's denial of the existence of agreement, the trial court should nevertheless allow the jury to learn that Donatta had been charged with a D.W.I. in an unrelated matter. Because the trial court could reasonably decide that the existence of a pending D.W.I. was not relevant to show bias, and because the trial court could have

decided that the possibility of prejudice from the testimony to the proceedings outweighed the probative value of the excluded testimony, we conclude the trial court did not abuse its discretion by disallowing Smith to recall Donatta during the presentation of Smith's case to the jury. We overrule issue one.

In issue two, Smith contends the jury charge allowed the jury to convict him for the nature of his conduct, using a weapon which resulted in a bodily injury, because the charge contains definitions of the culpable mental states that allowed his conviction without requiring the jury to find that Smith caused Donatta's bodily injury with the requisite criminal intent. Smith argues that the culpable mental states, as defined in the charge, allowed his conviction on proving that Smith used a deadly weapon which resulted in Donatta's bodily injury. According to Smith, the error in the charge harmed him by allowing his conviction for a crime for which he was not indicted.

In reviewing a claim of jury charge error, we must first decide whether error actually exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). If we find that error exists, we must then analyze that error for harm. *Id.* However, when a defendant fails to object or states that he has no objections to the charge, we will not reverse for jury charge error unless the record shows "'egregious harm'" to the defendant. *Id.* at 743-44 (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)).

During the charge conference, Smith's attorney advised the trial court that Smith did not have any objections to the proposed charge. When the defendant has not objected to the charge, to be reversible, the charge error being considered must be shown to have been so harmful that the defendant was denied a fair and impartial trial. *Almanza*, 686 S.W.2d at 171; *see also Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). "For both preserved and unpreserved charging error, 'the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.'" *Patrick v. State*, 906 S.W.2d 481, 492 (Tex. Crim. App. 1995) (en banc) (quoting *Almanza*, 686 S.W.2d at 171). "In assessing harm resulting from the inclusion of improper conduct elements in the definitions of culpable mental states, we 'may consider the degree, if any, to which the culpable mental states were limited by the application portions of the jury charge.'" *Patrick*, 906 S.W.2d at 492 (quoting *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994)).

A person commits the offense of aggravated assault if he intentionally, knowingly, or recklessly causes bodily injury to another and uses or exhibits a deadly weapon during the commission of the assault. Tex. Penal Code. Ann. §§ 22.01 (a)(1), 22.02(a)(2) (West 2011). Aggravated assault is a result-oriented offense. *Landrian v. State*, 268 S.W.3d 532, 533, 537 (Tex. Crim. App. 2008). "It is error for a trial judge to not limit the

definitions of the culpable mental states as they relate to the conduct elements involved in the particular offense." *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) (en banc). Nevertheless, if the application paragraph of the charge points the jury to the appropriate portion of the definitions, an error in providing definitions that do not limit the jury to considering only the results of the defendant's conduct is considered harmless error. *Patrick*, 906 S.W.2d at 493; *Hughes*, 897 S.W.2d at 296-97.

In Smith's case, in the abstract portion of the charge, the trial court provided the statutory definitions for the terms "intentionally," "knowingly," and "reckless." The definitions of the terms "intentionally," "knowingly," and "reckless" used in the charge mirror the definitions of those terms in the Texas Penal Code. *See* Tex. Penal Code Ann. § 6.03 (a), (b), (c) (West 2011). As a result, the definitions in the trial court's charge include both nature of conduct and result of conduct language. *See id.* However, the application paragraph of the charge instructed the jury to find Smith guilty if he "intentionally, knowingly[,] or recklessly caused bodily injury to Quinten Donatta, by the use of a Deadly Weapon, namely: a firearm by shooting him with the firear[m][.]" Because the application paragraph of the charge limited the jury's consideration to the result of Smith's conduct, causing bodily injury, we are confident that the jury's decision to convict Smith was based on the result of his conduct. We conclude that the facts, as applied to the law in the application paragraph of Smith's jury charge, pointed the jury to the appropriate portions of the definitions of the terms intentionally, knowingly, and

recklessly. Therefore, we conclude that the trial court's failure to limit the definitions of the terms under discussion did not result in any egregious harm. *Patrick*, 906 S.W.2d at 492-93; *Hughes*, 897 S.W.2d at 296-97; *Coleman v. State*, 279 S.W.3d 681, 686-87, *aff'd*, 246 S.W.3d 76 (Tex. Crim. App. 2008). We overrule Smith's second issue.

Having overruled both of Smith's issues, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on March 1, 2011
Opinion Delivered July 13, 2011
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Before McKeithen, C.J., Gaultney and Horton, JJ.