In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00104-CR

DRAKE JORDAN FINCH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CR-14E-072, Honorable Roland D. Saul, Presiding

April 7, 2017

MEMORANDUM OPINION ON REHEARING

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

We withdraw our opinion and judgment dated March 8, 2017, and substitute the following in its place. We overrule the motion for rehearing filed by appellant Drake Jordan Finch.

Appellant Drake Jordan Finch appeals from his conviction by jury of the offense of aggravated assault with a deadly weapon and serious bodily injury on a household

member[1] and the resulting sentence of forty years of imprisonment. Through two issues, appellant contends the trial court erred. We will affirm the judgment of the trial court.

Background

Appellant does not challenge the sufficiency of the evidence to support his conviction. Accordingly, we will relate only those facts necessary to disposition of his appellate issues. TEX. R. APP. P. 47.1.

Appellant was indicted for aggravated assault with a deadly weapon, namely his hand or other unknown object, causing serious bodily injury to his girlfriend, Ruth Simms. After his not-guilty plea, a jury heard the case. The State presented a number of witnesses to prove its allegation that appellant beat Simms so severely she sustained a "brain bleed." An emergency room doctor testified he diagnosed her with a subdural hematoma, an injury he opined was potentially serious. She was transferred to an Amarillo hospital for further treatment.

Analysis

Under the Penal Code, the offense of aggravated assault normally is a second-degree felony. TEX. PENAL CODE ANN. § 22.02(b) (West 2013). A person commits aggravated assault if he commits assault and causes serious bodily injury, or *uses or exhibits* a deadly weapon during its commission. TEX. PENAL CODE ANN. § 22.02(a) (italics ours). But aggravated assault is a felony of the first degree under certain circumstances. One of those circumstances is when the actor *uses* a deadly weapon

[1] TEX. PENAL CODE ANN. § 22.02(b)(1) (West 2013).

during the commission of the assault and causes serious bodily injury to a person whose relationship to or association with the actor is described by Section 71.0021(b), 71.003, or 71.005 of the Texas Family Code.[2] TEX. PENAL CODE ANN. § 22.02(b)(1) (italics ours).

The State indicted appellant for an offense that could constitute the first-degree, or the second-degree, level of aggravated assault. It alleged he "did intentionally, knowingly, and recklessly cause serious bodily injury to Ruth Simms by striking her or by causing her head to strike an object or by shaking her, and the defendant did then and there *use or exhibit* a deadly weapon, to-wit: his hand or an unknown object, during the commission of said assault, and the said Ruth Simms was a member of the defendant's household, as described by Section 71.005 of the Texas Family Code." (italics ours).

The court's charge to the jury followed the indictment, telling the jury in the application paragraph that it should find appellant "guilty as charged" if it found, among other elements, that he "did then and there use or exhibit a deadly weapon, to-wit: his hand or an unknown object, during the commission of said assault."

The charge also authorized the jury, if it found appellant not guilty of "aggravated assault as alleged in the indictment," to consider lesser offenses, including one that did not require use or exhibition of a deadly weapon.

[2] As counsel notes, the other circumstances raising a second-degree aggravated assault to a first-degree felony, those involving public servants, retaliation and offenses in motor vehicles, § 22.02(b)(2-3), are inapplicable here.

The presiding juror signed the verdict form indicating it found appellant "guilty of Aggravated Assault as alleged in the indictment."

The court's charge on punishment instructed the jury that the range of punishment for "Aggravated Assault as alleged in the indictment" was confinement in the institutional division for a term of five to 99 years or life, and a $10,000 fine. As noted, the jury assessed a sentence of forty years.

On appeal, appellant characterizes his issue as one challenging an illegal sentence. He contends, "The law of aggravated assault requires use or exhibition of a deadly weapon in order to convict a defendant of a second-degree felony, but where punishment is sought as a first-degree felony, an indictment alleging either use or exhibition – and a consequent verdict of use or exhibition – fall short . . . ."

Appellant contends that both the indictment and the application paragraph that authorized the jury to convict him of the first-degree felony offense charged in the indictment erroneously included both "uses" and "exhibits" a deadly weapon. However, he asserts, the law is clear that a person commits a felony of the first degree in this context when he uses, but not when he merely exhibits, a deadly weapon.[3]

Appellant argues this error extended to punishment because he was sentenced to forty years of imprisonment, a term within the statutory range for first-degree felonies but well outside the term for second-degree felony offenses. Consequently, he

[3] The State argues appellant failed to preserve error for appellate review because he did not object to the indictment nor did he file a motion to quash. Further, the State contends, the indictment provided sufficient notice to appellant that he was charged with a first-degree felony. We do not find the State's arguments dispositive of appellant's issues.

contends, the sentence he received is illegal and the cause should be remanded for a new punishment hearing.[4] *See State v. Marroquin,* 253 S.W.3d 783, 785 (Tex. App.—Amarillo 2007, no pet.) (a punishment that falls outside the proper range requires remand for re-sentencing).

We agree with appellant the record reflects error, but we disagree the result is an illegal sentence. As the First Court of Appeals recently observed, "A mischaracterization of an offense in an indictment may lead to a sentence that is in violation of the law." *Sierra v. State*, 501 S.W.3d 179, 183 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Ex parte Rich*, 194 S.W.3d 508, 512 (Tex. Crim. App. 2006)). But that is not what happened here. Appellant's argument contains the premise that the indictment cannot be read to allege first-degree aggravated assault. His brief states, "[H]ere a mere cursory reading of the indictment shows that, via the language of 'use *or* exhibit,' the indictment, the jury charge's application paragraph and the consequent verdict make up only second-degree aggravated assault." (italics in original). But appellant does not explain why the indictment must be read to allege only second-degree aggravated assault.[5] The indictment, on its face, contained all the elements required for conviction of first-degree aggravated assault under Penal Code section 22.02(b)(1). *See Teal v. State*, 230 S.W.3d 172, 180 (Tex. Crim. App. 2007); and *id*. at

[4] Appellant concedes the evidence is "unquestionably legally sufficient to convict appellant of the second-degree aggravated assault listed in the indictment" but, because his sentence exceeds the maximum possible term for that offense and no enhancements were alleged or proved, the judgment should be reformed to reflect conviction of the second-degree offense.

[5] And, for obvious reasons, in his briefing appellant makes clear his complaint is not with the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (West 2015) (requiring that objection to defect, error or irregularity in an indictment be made before trial on merits commences).

184 (Keller, P.J., concurring) (addressing adequacy of charging instrument). And as the State points out, the indictment's allegation appellant committed assault on a member of his household would bear on the first-degree level of aggravated assault but not the second degree.

The error we find reflected in the record is charge error. Our review of alleged jury charge error involves a two-step process. *Lampkin v. State,* 470 S.W.3d 876, 894 (Tex. App.—Texarkana 2015, pet, ref'd) (citing *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994); *Sakil v. State,* 287 S.W.3d 23, 25-26 (Tex. Crim. App. 2009); *Ngo v. State,* 175 S.W.3d 738, 743 (Tex. Crim. App. 2005)). Initially, we determine whether an error occurred and then "determine whether sufficient harm resulted from the error to require reversal." *Id.* (citation omitted).

We agree with appellant that the statute explicitly requires "use" of a deadly weapon among the elements of the first-degree offense. And we agree with appellant that "use" and "exhibit" cannot be used interchangeably. To "use" a deadly weapon during the commission of an offense means that the deadly weapon was employed or utilized in order to achieve its purpose; to "exhibit" a deadly weapon requires only that it be consciously displayed during the commission of the required felony offense. *Boston v. State,* 373 S.W.3d 832, 837 (Tex. App.—Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013) (*citing Patterson v. State,* 769 S.W.2d 938, 940-41 (Tex. Crim. App. 1989); *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000)).[6]

[6] The Legislature does not always require use of a deadly weapon as the aggravating factor. As an example, the statute defining the offense of robbery provides that the offense becomes aggravated robbery, a first-degree felony, when the actor

The language in the application paragraph tracking the indictment language was erroneous because it effectively allowed the jury to find appellant guilty of a first-degree felony if he either used or exhibited a deadly weapon when such a finding would be lawful only if he actually used the weapon. The jury found appellant guilty "as charged in the indictment." The indictment authorized appellant's conviction under the theory he used a deadly weapon. It also authorized appellant's conviction under the theory he exhibited a deadly weapon. Because the charge did not distinguish between those theories, it was erroneous. *Cf. Ex parte Drinkert,* 821 S.W.2d 953, 955 (Tex. Crim. App. 1991) (discussing general verdicts and addressing instructions allowing the jury to convict the defendant on an impermissible legal theory as well as on a proper theory or theories).

Having determined the charge on guilt-innocence contained error, we turn to the question of harm to appellant. When, as here, the complaining party fails to object to the error in the charge, he must demonstrate egregious harm before reversal is warranted. *Arrington v. State,* 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). Egregious harm is a very difficult standard to meet and requires a case-by-case analysis. *Id.* (citation omitted). Charge error is "egregiously harmful if it affects the very basis of the

---

"uses or exhibits a deadly weapon." TEX. PENAL CODE ANN. § 29.03(a)(2). Likewise, section 12.35(c)(1) provides: "An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial for the offense that: (1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited." TEX. PENAL CODE ANN. § 12.35(c)(1). We apply the statute as written. *See State v. Young,* 265 S.W.3d 697, 707 (Tex. App.—Austin 2008, pet. denied) (courts are to presume that the legislature was aware of the implications of the language it chose and that it acted deliberately in making that choice).

case, vitally affects a defensive theory, or deprives the defendant of a valuable legal right." *Id.* In determining whether charge error is egregious, we must review the record and consider: (1) the jury charge as a whole; (2) the evidence, including the contested issues and the weight of the probative evidence; (3) closing arguments; and (4) other relevant information from the entire record. *Id.* (citations omitted). "Neither the appellant nor the State bears any burden on appeal to show harm or lack thereof; rather, reviewing courts must examine the record and make an independent determination as to whether the appellant suffered 'actual harm' as opposed to 'theoretical harm' as a result of the trial court's error." *Id.* (citations omitted).

Having reviewed the record and considered the required factors, we conclude any harm appellant suffered from the confused charge on guilt-innocence was theoretical, not actual. The contested issues, the evidence, the arguments and the record as a whole all demonstrate appellant did not merely exhibit the deadly weapon, and demonstrate there was no suggestion he merely exhibited the deadly weapon.

Except for the errors we have noted, the jury charge properly set forth the law. Beginning with voir dire, the State made clear during trial that appellant was being tried for first-degree aggravated assault. Appellant's defense at trial contested the evidence showing he was the person who injured Simms. On appeal, appellant concedes there is strong evidence supporting his conviction for aggravated assault with a deadly weapon and serious bodily injury on a household member. At trial, the State emphasized in argument the evidence showing appellant "used" a deadly weapon and on appeal, the State points out appellant never argued he did not. The injuries Simms suffered, including a "brain bleed," hardly could have been incurred merely through the

exhibition of a weapon. If the jury believed appellant caused the injuries, it must also have believed he utilized some means to inflict those injuries and could not have believed he only exhibited a weapon. No egregious harm is shown. *See, e.g., Jackson v. State,* No. 14-11-00781-CR, 2012 Tex. App. LEXIS 6606, at *14-15 (Tex. App.—Houston [14th Dist.] Aug. 9, 2012, no pet.) (mem. op., not designated for publication) (finding no charge error in comparable circumstance).

Finding no harmful error, we overrule appellant's first issue.

By his second issue, appellant contends the court's charge on punishment contained error that was egregiously harmful because it authorized punishment for first-degree aggravated assault. The premise of the contention is that appellant was convicted only of the second-degree offense. Having rejected that premise in our disposition of appellant's first issue, we find no error in the punishment charge. Appellant's second issue is overruled.

Conclusion

While we find the trial court's charge erroneous, we also find appellant was not egregiously harmed by the error and affirm the judgment of the trial court.

James T. Campbell
Justice

Do not publish.