In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00417-CR

KEVIN NEIL MITCHELL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 287th District Court
Parmer County, Texas
Trial Court No. 3418, Honorable Gordon Green, Presiding

August 8, 2017

MEMORANDUM OPINION

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

A jury found appellant Kevin Neil Mitchell guilty of the offense of theft of property valued between $1,500 and $20,000.[1] It assessed punishment at confinement in a state jail for one year and a fine of $1,000 with the sentence of confinement suspended.

[1] TEX. PENAL CODE ANN. § 31.03(a),(e)(4)(A) (West Supp. 2016). The indictment charged appellant committed the offense on or before October 22, 2014. The statute was amended effective September 1, 2015 by increasing the value of property constituting a state jail felony to more than $2,500 but less than $30,000. Offenses committed before the effective date are governed by the law then in effect. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, §§ 10, 30, 31, 2015 TEX. GEN. LAWS 4209, 4213, 4221-4222.

The trial court sentenced appellant accordingly and placed him under an order imposing conditions of community supervision. On appeal, appellant raises two issues asserting reversible error in the court's charge at the guilt-innocence phase. We will overrule each, and affirm the judgment of the trial court.

Background

Although appellant does not challenge the sufficiency of the evidence to support his conviction, some discussion of the evidence is necessary to an understanding of the issues he raises. It is undisputed that Ronald Dale Warshaw was the owner of a black flatbed trailer described as a 2014 Load Trailer carhauler. Warshaw testified he bought the trailer in June 2014 for $4,350, and that it was stolen from his shop in Slaton, Texas in October 2014.

Appellant and his girlfriend Melissa Boone testified. Their testimony showed they were in the trucking business together, and lived on property near Bovina, Texas. Steve Manahan was a long-time friend of appellant's from Lubbock. He, like appellant, was familiar with trailers. Sometime before the date the black trailer was stolen, appellant expressed to Manahan an interest in purchasing a flatbed trailer. Not long thereafter Manahan was contacted at a Lubbock club by Randy Harper. According to Manahan, Harper wanted to borrow $1,000 on a black trailer in "a pawn shop type" arrangement, but without interest. Harper told Manahan the trailer was his.

Manahan told appellant about the trailer and provided him with photographs. Asked how the trailer appeared to him, Manahan testified it "appeared to be kind of an expensive trailer."

On an afternoon in October 2014, Manahan and Harper drove separately to appellant's residence. Harper pulled the black trailer and Manahan pulled a smaller gray trailer he borrowed from a friend. Manahan testified he brought the gray trailer along, intending to buy a load of hay for his horses. The gray trailer had no working lights and could therefore not be used at night.

At appellant's residence he and Harper, and to some extent Manahan, negotiated over the black trailer. Through their trial testimony, Manahan and appellant each presented different versions of the parties' intentions. Manahan described an interest-free loan of $1,000 to Harper, secured by the black trailer. Appellant understood he was buying the trailer from Harper for $1,000.

At some point during the evening Boone obtained $700 from an ATM and gave it to appellant. Manahan agreed to pay the remaining $300 Harper sought on the trailer. It was intended that Harper would repay the $1,000 within thirty days. According to Manahan, if Harper ever wished to sell the black trailer and could produce "paperwork" appellant might have been interested in buying it. In contrast, appellant testified he was "buying the trailer outright" from Harper. He gave Harper the $700 and was to "get a title or a bill of sale" when the $300 balance was paid.

By the time the negotiations concluded, it was dark so Manahan left the gray trailer at appellant's residence. He intended to return at a later date and get hay during daylight hours. Harper also departed, leaving the black trailer with appellant. According to appellant, when Harper did not return to collect the $300 due on the trailer appellant thought, "[s]omething is not right."

Thereafter, the Parmer County chief deputy sheriff received a report from a Department of Public Safety trooper concerning a stolen trailer. The report lead him and the county sheriff to appellant's residence.

The officers arrived early in the morning of October 22, 2014. They saw the black trailer attached to a pickup. According to appellant, his cousin Richard Garner was borrowing the trailer. Appellant freely cooperated with the officers' investigation. He told the chief deputy Manahan left the two trailers with him and would return during the week to pick them up. He also told the deputy that if the trailers "were hot, he didn't want them."

As he examined the trailers the deputy noticed a license plate lying in the bed of the black trailer while another license plate was on the trailer. He observed the gray trailer had no license plate. Later investigation revealed the plate affixed to the black trailer actually was issued for the gray trailer, and the black trailer's issued plate was the plate lying in the trailer's bed.

The deputy's testimony, and a photograph in evidence, also show the expiration-date sticker of the black trailer's plate had been cut apart to remove a figure "5." His testimony, and photographs, also show the figure "5" had been affixed onto the expiration-date sticker of the plate then on the black trailer, making it appear that the plate on the stolen trailer would expire in 2015 rather than 2014.

In addition, the sheriff and deputy observed the black trailer's vehicle identification sticker had been scraped away. The deputy's testimony, and photographs, depict the scraped appearance of the sticker's previous location on the

trailer, and debris ("shavings") from the sticker underneath on the trailer ("shavings off of the sticker were on the . . . little lip of the trailer") and on the ground below.

Appellant and Garner were arrested.[2] Later that morning, appellant gave the sheriff a statement, electronically recorded, which was admitted into evidence. Excerpts were played for the jury and during its deliberation the jury requested and was allowed to watch the entire recording. In the interview, appellant told the sheriff he bought the trailer from Manahan. According to appellant he had a "good idea" he was going to buy the trailer before he saw it. Manahan brought the trailer to appellant's house. The price was $1000. Appellant paid $700 down and paid Manahan the $300 the following weekend.[3] When asked by the sheriff if he knew the trailer was stolen, appellant responded, "I had an idea. I mean for the price that I paid for it you would almost have to know it was stolen. Was it told? No. But would I deny that it was? I mean, of course, it had to have been for the $1000 I paid for the trailer." Appellant stated he scraped the VIN label off the black trailer "for the simple fact of knowing or pretty well assuming the trailer was hot or stolen." When asked what he thought the trailer was worth appellant responded "upwards of seven-ten-twelve . . . darn nice trailer." Near the end of the interview appellant stated, "I'm sorry for what I've done . . . . I'm not a thief . . . I'm very sorry for having this trailer. I mean I really am. I was in the wrong for purchasing the trailer." At the conclusion of the interview appellant agreed that everything he told the sheriff was the truth.

[2] Garner was not prosecuted.

[3] During his testimony, Manahan denied he received any money for the trailer, and said any statement to the contrary was a lie. Harper did not testify.

In his trial testimony, appellant said he "took the blame for all of it" to protect his cousin Garner. He told the jury he had "no clue" who switched the license plates, if they were switched. He admitted telling the sheriff he removed the trailer's VIN label. But, asked at trial who scratched off the number, he responded, "I'm assuming my cousin." Appellant said he did not know the trailer was stolen until he was arrested. The sheriff, in his testimony, agreed appellant seemed surprised to learn it was stolen.

Analysis

In his first issue, appellant asserts the trial court erred by denying his request that the jury charge include a mistake-of-fact instruction. Through his second issue, appellant contends the trial court erred by failing to limit its jury-charge definition of the "knowing" culpable mental state to the relevant conduct element of the charged offense.

Law of General Application

A claim of jury charge error is reviewed using the procedure set out in *Almanza v. State*. 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *Barrios v. State,* 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). In analyzing such an issue we first determine whether error exists. *Ngo v. State,* 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, we then determine whether the error caused sufficient harm to warrant reversal. *Ngo,* 175 S.W.3d at 743-44.

A person commits the offense of theft if "he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE ANN. § 31.03(a). Appropriation of property is unlawful if it is without the owner's effective consent; or the property is stolen and the actor appropriates the property knowing it was stolen by

another. TEX. PENAL CODE ANN. § 31.03(b)(1),(2). Appropriate means, *inter alia*, to acquire or otherwise exercise control over property other than real property. *Id.* at § 31.01(4) (West 2016).

Because appellant timely objected to the two charge errors he urges on appeal, if we agree error occurred, we must reverse his conviction if we find the error was "calculated to injure [his] rights." *Almanza,* 686 S.W.2d at 171. That means reversal is required if there was "some harm" to appellant from the error. *Ngo,* 175 S.W.3d at 744. Cases involving preserved charge error are to be affirmed only if no harm has occurred. *Biera v. State,* 280 S.W.3d 388, 394 (Tex. App.—Amarillo 2008, pet. ref'd) (citing *Arline v. State,* 721 S.W.2d 348, 351 (Tex .Crim. App. 1986)). Harm leading to reversal must be "actual," however; harm that is merely theoretical will not suffice. *Sanchez v. State,* 376 S.W.3d 767, 774-75 (Tex. Crim. App. 2012).

We assess the degree of harm from charge error in light of the entire jury charge, the state of the evidence, including the 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. *Almanza,* 686 S.W.2d at 171.

First Issue: Failure to Submit Mistake-of-Fact Instruction

A trial court's denial of a requested jury instruction is reviewed for abuse of discretion. *See Wesbrook v. State,* 29 S.W.3d 103, 122 (Tex. Crim. App. 2000) (finding in the face of no supporting evidence trial court did not abuse its discretion by refusing to submit requested instruction). A trial court must submit an instruction on every defensive issue raised by the evidence, "regardless of whether the evidence is strong,

feeble, unimpeached, or contradicted, and even when the trial court thinks that the testimony is not worthy of belief." *Rogers v. State,* 105 S.W.3d 630, 637 (Tex. Crim. App. 2003) (concerning voluntariness of conduct as defensive issue); *cf*. *Celis v. State,* 416 S.W.3d 419, 430 (Tex. Crim. App. 2013) (citing *Allen v. State,* 253 S.W.3d 260, 267 (Tex. Crim. App. 2008) ("A defendant is entitled to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of how the trial court views the credibility of the defense"). This rule allows the jury, not the judge, to decide the relative credibility of the evidence. *Miller v. State,* 815 S.W.2d 582, 585 (Tex. Crim. App. 1991) (en banc).

It is "a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense." TEX. PENAL CODE ANN. § 8.02(a) (West 2011). The Penal Code defines a "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." TEX. PENAL CODE ANN. § 1.07(a)(42) (West Supp. 2016). For purposes of the mistake-of-fact instruction, the reasonableness of a defendant's belief is a question of fact for the jury. *Granger v. State,* 3 S.W.3d 36, 38-41 (Tex. Crim. App. 1999). A defendant who properly requests an instruction on mistake of fact is entitled to the instruction if he presents some evidence that, through mistake, he formed a reasonable belief about a matter of fact and his mistaken belief would negate the intent or knowledge required for conviction. *See Celis,* 416 S.W.3d at 430 (citing *Beggs v. State,* 597 S.W.2d 375, 378 (Tex. Crim. App. 1980)); *Granger,* 3 S.W.3d at 41 ("When an accused creates an issue

of mistaken belief as to the culpable mental element of the offense, he is entitled to a defensive instruction on mistake of fact") (internal quotation marks omitted)).

The State's case against appellant depended on proof he exercised control over the black trailer, knowing it was stolen by another. The critical disputed issue at trial was whether he knew the trailer was stolen. Through the evidence of his recorded statement to the sheriff and his testimony at trial, the jury heard appellant give differing accounts of his knowledge of the trailer's stolen character. In one of the accounts, during his testimony, appellant agreed with his counsel that "it is possible [he] made a mistake as to the ownership of the [black] trailer." He also agreed that he did so "in good faith." As we have noted, he also said he did not know the trailer was stolen until the sheriff arrived at his house. Boone and Manahan testified to the effect that nothing about the transaction with Harper caused them to believe the trailer was stolen.

This evidence, viewed in its most favorable light, asserts appellant mistakenly believed Randy Harper was the black trailer's lawful owner. So viewed, it thus tended to negate the allegation that appellant appropriated the trailer knowing it was stolen. Reasonableness and credibility determinations were for the jury. We agree with appellant that the trial court erred by denying appellant's request for a mistake-of-fact instruction. *See Celis,* 416 S.W.3d at 430; *Durden v. State*, 290 S.W.3d 413, 419 (Tex. App.—Texarkana 2009, no pet.) ("The fact that the mistake-of-fact instruction requested by Durden might be viewed as repetitive to the required proof that the jury find Durden intentionally or knowingly committed the charged crime does not obviate the trial court's statutory duty to include that properly requested instruction . . . . Nor does the view that Durden's testimony might have been seen by the trial court or the jury as feeble,

contradicted, impeached, or incredible undermine Durden's entitlement to a defensive instruction" (citations omitted)).

We now consider whether the court's error harmed appellant. The charge's application paragraph required for conviction that the jury find appellant unlawfully appropriated the trailer, by acquiring or otherwise exercising control over it, "knowing that the property was stolen by another." The instruction appellant requested would have told the jury to find him not guilty if it concluded that in taking possession of the trailer "he acted under a mistake of fact, that is, a reasonable belief that it was not stolen, or had a reasonable doubt" whether that was so.[4]

Concerning harm, appellant presents an argument like that a majority of a Fourteenth Court panel accepted in *Jenkins v. State*, 468 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd, improvidently granted), in which the defendant was convicted of voting illegally in an election in which he knew he was not eligible to vote. *Id.* at 658. The court there was assessing the harm to the defendant of the trial court's erroneous denial of a mistake-of-law instruction. *Id.* at 680. Rejecting the State's assertion the defendant suffered no harm, the majority noted the greater weight that an argument backed up by the court's instructions carries over a mere argument made by counsel. *Id.* at 681; *see also Durden*, 290 S.W.3d at 423 (Moseley, J., dissenting) (noting that if court had given mistake-of-fact instruction, defendant "could further have used the requested instruction to emphasize in closing argument that it was

[4] The State argues appellant's requested instruction did not present a correct statement of the law. We do not address the question.

not just his opinion that the jury could not find guilt if there had been a mistake of fact, but that the court had instructed it precisely that mistake of fact was a valid defense").

Durden involved a prosecution for theft of copper wire. He testified he found the wire and believed it was "abandoned, junk copper wire." 290 S.W.3d at 416. The court of appeals agreed with his appellate contention that, if believed, his testimony would have negated the element of the theft charge requiring proof he intended to deprive the rightful owner of the property. *Id*. at 419. The majority in the appellate court concluded, however, that Durden suffered no actual harm from the trial court's error of denying him a mistake-of-fact instruction. *Id*. at 421. The majority noted the jury was instructed that to find Durden guilty it must find he appropriated property with the intent to deprive the owner of it. Citing that court's opinion in *Sands v. State*,[5] the majority held the jury charge thus "allowed the jury to consider whether Durden mistakenly believed that the copper wire was abandoned or he took the property with the intention of depriving the owner of that property." *Id*. Noting the issue of his asserted mistake was fully argued, the majority concluded the jury's guilty verdict "inferentially resolved the issue that would have otherwise been required via the requested instruction." The majority continued, "It would require us to resort to mere conjecture to conclude, on this evidentiary record, that Durden suffered any actual harm." *Id*.; *see also Jenkins*, 468 S.W.3d at 691 (Busby, J., dissenting) (concluding no harm shown from omission of mistake-of-law instruction when charge required proof that defendant knew he was not a resident of the precinct in which he voted; "the jury could not find both that [Jenkins] knew he was not a resident but had a reasonable belief he was a resident").

[5] 64 S.W.3d 488 (Tex. App.—Texarkana 2001, no pet.).

After consideration of the entire jury charge, the evidence, including the contested issues and the weight of probative evidence, and the arguments of counsel, *Almanza,* 686 S.W.2d at 171, we conclude for several reasons the record in this case does not show appellant suffered actual harm from the denial of the mistake-of-fact instruction. First, as noted, the charge's application paragraph required for conviction that the jury find appellant appropriated the black trailer "knowing that the property was stolen by another." As the court found in *Sands* under comparable circumstances, the requirement that the jury make a decision whether the evidence proved beyond reasonable doubt that appellant knew the trailer was stolen "puts squarely in point" the question of whether appellant had a mistaken belief contrary to the required guilty knowledge. *See Durden*, 290 S.W.3d at 421 (quoting *Sands*, 64 S.W.3d at 496). Appellant's understanding of his transaction with Harper, his confidence in Manahan and the "possibility" of his mistaken belief about the trailer's ownership were thoroughly explored during testimony and ably argued to the jury. The charge, the evidence and the argument gave the jury opportunity to accept appellant's contention at trial that he did not know the trailer was stolen, and the charge required it to find he did know. *See Posey v. State*, 966 S.W.2d 57, 70-71 (Tex. Crim. App. 1998) (Womack, J., concurring) (egregious harm analysis; finding defensive issue was "squarely presented to the jury by the charge"); *Reyes v. State*, 422 S.W.3d 18, 31-32 (Tex. App.—Waco 2013, pet. ref'd) (similar conclusion on harm from preserved charge error contention); *see also Okonkwo v. State*, 398 S.W.3d 689 (Tex. Crim. App. 2013) (holding no ineffective assistance of counsel from failure to request mistake-of-fact instruction).

Injection of the concept of "mistake" into the court's charge to the jury would have enabled counsel to point to the instruction in argument, as the dissenting opinion stated in *Durden*, 290 S.W.3d at 423 (Moseley, J., dissenting). But the evidence of a mistaken belief that Harper was the trailer's rightful owner does nothing in this case to address the State's evidence of appellant's thorough confession in his recorded statement or the strong circumstantial evidence that the VIN sticker was removed from the trailer as it sat beside appellant's house, further suggesting that the license plate alterations also occurred there.[6] This additional evidence, unrefuted by any suggestion of "mistake," makes it substantially less likely that jurors would have been influenced by an instruction on mistake. Finding appellant suffered no harm from the omission of an instruction on mistake of fact, we overrule his first issue.

Second Issue: Limiting the Jury-Charge Definition of Culpable Mental State

Under the Penal Code "element of offense" means the forbidden conduct, any required result, the required culpability, and negation of any exception to the offense. TEX. PENAL CODE ANN. § 1.07(a)(22). "Section 6.03 of the Texas Penal Code sets out: four culpable mental states—intentionally, knowingly, recklessly, and criminally negligently; two possible conduct elements—nature of the conduct and result of the conduct; and the effect of the circumstances surrounding the conduct." *Price v. State,* 457 S.W.3d 437, 441 (Tex. Crim. App. 2015); TEX. PENAL CODE ANN. § 6.03 (West 2011). Result-of-conduct offenses concern the product of certain conduct. *Robinson v. State,* 466 S.W.3d 166, 170 (Tex. Crim. App. 2015). Nature-of-conduct offenses are

[6] As the State points out, appellant's stated assumption that his cousin Garner was responsible for the missing VIN sticker conflicts with his contemporaneous assertion that Garner "knew nothing" of the trailer.

defined by the act or conduct that is punished, regardless of any result that might occur. *Id.* "Lastly, circumstances-of-conduct offenses prohibit otherwise innocent behavior that becomes criminal only under specific circumstances." *Id.*

In a case relying on Penal Code section 31.03(b)(2), whether the defendant has unlawfully appropriated stolen property depends on whether he did so knowing it was stolen by another. TEX. PENAL CODE ANN. § 31.01(4)(b) (defining appropriate); § 31.03(a)(b)(2) (defining one type of unlawful appropriation of property); *see McClain v. State*, 687 S.W.2d 350, 354 (Tex. Crim. App. 1985) (knowledge that property was stolen by another is "subset" of knowledge that its possession is without the owner's consent); *Ex parte Smith*, 645 S.W.2d 310, 312 (Tex. Crim. App. 1983) (*sine qua non* of offense of theft is lack of effective consent of owner). Thus it is knowledge of the circumstances surrounding possession of stolen property that makes appropriation, as charged here, unlawful.

In the abstract portion of the charge the court gave the full statutory definition of "knowingly," as follows:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. 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.

Appellant objected at trial, asking the court to limit its definition to the circumstances surrounding conduct. The court overruled the objection, and its ruling is the subject of appellant's second issue.

The trial court erred by not properly limiting the definition of knowing or knowledge to the circumstances surrounding appellant's appropriation of the trailer. *Price,* 457 S.W.3d at 411 (trial court errs when it fails to limit language in regard to applicable culpable mental states to the appropriate conduct element); *Cook v. State,* 884 S.W.2d 485, 490-91 (Tex. Crim. App. 1994). Because the issue was preserved for appellate review, we again consider whether the record reflects appellant suffered "some harm" from the overly-broad definition of the knowing culpable mental state. When we assess harm from the inclusion of improper conduct elements in the definition 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." *Hughes v. State,* 897 S.W.2d 285, 296 (Tex. Crim. App. 1994) (quoting *Cook,* 884 S.W.2d at 491-92 n.6); *Coleman v. State,* 279 S.W.3d 681, 686 (Tex. App.—Amarillo 2006), *aff'd, Coleman v. State,* 246 S.W.3d 76 (Tex. Crim. App. 2008).

Appellant argues that the charge error was harmful because it allowed the jury to apply all three definitions of knowingly, as the culpable mental state related to his appropriation of the trailer. Considering the language of the charge's application paragraph, however, we readily conclude the jury's application of the definition was properly limited to appellant's knowledge of the circumstances surrounding his appropriation of the trailer. In *Hughes*, 897 S.W.2d at 296, the court considered whether language of an application paragraph sufficiently directed the jury to the appropriate part of the full statutory definitions of the culpable mental states. One phrase of the application paragraph required the jury to find that the defendant "knew that the said [victim] was a peace officer." The court found it clear that such a

requirement referred to the "circumstances surrounding the conduct" part of the statutory definitions of the term "knowingly." *Id*. Following *Hughes*, we find the same is true of the application-paragraph language in this case requiring the jury to find appellant appropriated the trailer knowing it was stolen. Accordingly, because the jury was directed to the appropriate definition by the application paragraph, no harm is shown from the court's failure to limit the abstract definitions to that pertinent to circumstances surrounding conduct. Appellant's second issue is overruled.

Conclusion

Having overruled appellant's two issues, we affirm the judgment of the trial court.

James T. Campbell
Justice

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