In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00160-CR

TRUITT RUSSELL COOK, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court Number 4
Tarrant County, Texas
Trial Court No. 1442298R, Honorable Michael Thomas, Presiding

April 16, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

A jury convicted appellant Truitt Russell Cook on two counts of robbery[1] and set punishment at seventeen years' confinement in prison on each count. The trial court imposed concurrent sentences accordingly. We will overrule appellant's four issues on appeal and affirm the judgment of the trial court.

[1] TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011).

Background

Appellant does not challenge the sufficiency of the evidence so we will mention only so much of the background facts as necessary for our disposition of his issues. On February 12, 2015, appellant and Tianna Insall robbed the A1 Smoke Shop in rural Tarrant County. They wore dark glasses and bandannas. Appellant carried what the two store employees called "a gun." Once inside the store appellant and Insall directed the two employees to lie on the restroom floor. Appellant and Insall took items from the store inventory, including packages of K2,[2] and cash from the register. They fled the business without harming either employee. One of the employees called 9-1-1. A store security camera recorded the occurrence.

The next day a Hood County deputy sheriff stopped appellant and Insall as they drove a vehicle owned by her parents. Both were arrested on outstanding warrants and transported to the Hood County jail for detention. Law enforcement obtained a warrant and searched the vehicle. There they located many packages of K2.

Tarrant County detectives first interviewed Insall, then appellant, in an interview room of the Hood County jail. In appellant's recorded statement, given about 11:00 p.m. after the arrest, he admitted involvement in the robbery.

Appellant was indicted on two counts of aggravated robbery and two counts of robbery; eventually, only the robbery charges were submitted to the jury. Appellant moved to suppress his recorded statement and tangible evidence seized when he was

[2] K2 is a type of synthetic marijuana. *In re K.S.,* No. 02-14-00073-CV, 2014 Tex. App. LEXIS 8693, at *4-5 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.).

arrested on the grounds that the warrant improperly abbreviated the name of the offense and his statement was taken after he invoked the right to remain silent and terminate the interview. The trial court denied the motion.

At trial, Insall testified, admitted her involvement in the robbery and implicated appellant as well. The jury also saw and heard appellant's recorded statement, and heard a recording of the 9-1-1 call. Appellant testified in his own defense, saying he did not commit the robbery and gave a false statement to the detectives hoping to protect Insall.

On the State's motion, we abated the appeal and remanded the case so the trial court could file findings of fact and conclusions of law concerning the suppression hearing.[3] In a conclusion of law the court expressed its determination that appellant was not in custody for purposes of the protections of *Miranda*[4] and article 38.22[5] when he gave his recorded statement.

Analysis

First Issue: Suppression of Appellant's Statement

Appellant's first issue challenges the trial court's denial of his motion to suppress his recorded statement. He specifically contends he invoked the right to remain silent

[3] *See Cook v. State,* No. 07-16-00160-CR, 2016 Tex. App. LEXIS 7604 (Tex. App.—Amarillo July 15, 2016, per curiam order) (not designated for publication).

[4] *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(a) (West Supp. 2017).

and terminate the interview but the Tarrant County detectives nevertheless continued their custodial interrogation, eventually obtaining his confession. We overrule the issue.

The trial court conducted a pretrial hearing on the suppression motion. Appellant did not testify at the hearing.[6] The court heard testimony from the Hood County deputy sheriff who arrested appellant and from one of the Tarrant County detectives, Gantt, who interviewed appellant. The recording of the interview also was admitted at the hearing, and parts of it played for the court.

Three of the court's findings of fact describe the sequence of events during the interview that leads to appellant's first issue:

> 12. At the very start of the interview Gantt and Morris identified themselves as investigators with the Tarrant County Sheriff's Office. After gathering some preliminary information such as Cook's full name, residence, and employer, the detectives re-introduced themselves and explained that they were investigating an "incident that occurred yesterday outside of Fort Worth." They "wanted to talk about it," they explained, and asked if Cook wished to discuss it and if he knew what they were talking about.
>
> 13. Cook acknowledged that he did know what they wanted to discuss -- he claimed "other officers had been talking about it" and identified the "incident" as "that robbery . . . of that Smoke Store." The deputies asked if he "had been a part of that?" to which Cook replied, "No, sir." The investigators followed up with, "Do you know anybody who was a part of that?" which Cook also denied. Gantt then asked: "Do you feel like talking about anything related to the robbery?" Appellant replied, "No, sir."
>
> 14. Gantt asked Cook to read along as he read Cook his rights, and slipped a printed card across the desk.[7]

[6] Appellant testified during the guilt-innocence phase of trial. His testimony there does not affect our analysis of his first issue.

[7] Record references in original omitted.

As the court's findings state, before administering the *Miranda* and article 38.22 warnings, detective Gantt determined that appellant was aware they were there to discuss the robbery, then asked appellant if he had "been a part," and if he knew anyone "who was a part," of the robbery. On receiving negative responses to the first two questions, Gantt propounded the third question, and when he again received a negative response, initiated the required warnings.

The trial court's findings also state that "At no time during the interview did [appellant] request that the interview cease or be terminated."

An appellate court reviewing a trial court's ruling on a motion to suppress applies a bifurcated standard of review. *Abney v. State,* 394 S.W.3d 542, 547 (Tex. Crim. App. 2013). We give "almost total deference" to the trial court's findings of historical facts that are supported by the record and to mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). "A question 'turns' on an evaluation of credibility and demeanor 'when the testimony of one or more witnesses, if believed, is always enough to add up to what is needed to decide the substantive issue.'" *Abney,* 394 S.W.3d at 547 (quoting *Loserth v. State,* 963 S.W.2d 770, 773 (Tex. Crim. App. 1998)). At a suppression hearing, the trial court is the exclusive trier of fact. *Valtierra v. State,* 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). In assessing the credibility of the witnesses and assigning weight to their testimony, the court is entitled to believe or disbelieve any or all of a witness's testimony, even if uncontroverted, because the judge has the opportunity to observe the witness's demeanor and appearance. *Id.*; *Johnson v. State,* 871 S.W.2d 744, 748 (Tex. Crim. App. 1994). When, as here, the trial court makes findings of fact, an appellate court determines

whether the evidence supports those findings. *Abney,* 394 S.W.3d at 548. Doing so, we view the evidence, and the court's findings, in the light most favorable to its ruling. *Id*.; *State v. Granville*, 423 S.W.3d 399, 404 (Tex. Crim. App. 2014). This deferential standard applies to a trial court's determination of historical facts based on a videotape recording. *Carter v. State*, 309 S.W.3d 31, 40 (Tex. Crim. App. 2010). The court's legal rulings are reviewed de novo unless its explicit fact findings that are supported by the record are dispositive of the legal ruling. *Abney,* 394 S.W.3d at 548.

The United States Supreme Court held in 1964 that the Fifth Amendment's privilege against self-incrimination is applicable, through the Fourteenth Amendment, to proceedings in the states. *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Two years later, in *Miranda*, the Court held the privilege extends to custodial police interrogations, and prescribed warnings required to precede such interrogations. The first of the required warnings is the familiar statement that the one interrogated "has the right to remain silent." 384 U.S. at 467-68. *Miranda* went on to say that if the one in custody indicates he wishes to remain silent, "the interrogation must cease," *id*. at 473-74, and to make clear the exercise of the right of silence must be "scrupulously honored." *Id*. at 479. The Court further addressed the exercise of the "right to cut off questioning" in *Michigan v. Mosley,* 423 U.S. 96, 103, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975) (quoting *Miranda*, 384 U.S. at 474). The Court there stated, "Through the exercise of his option to terminate questioning [the one in custody] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that

the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" 423 U.S. at 103-04 (footnote omitted).

An effective invocation of the right to remain silent in the face of interrogation, however, must be unambiguous. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (citing *Davis v. United States*, 512 U.S. 452 (1994)). "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" 560 U.S. at 382 (quoting *Davis,* 512 U.S. at 461).

Addressing the facts of the case before it, the Court in *Berghuis* noted that the defendant "did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'" 560 U.S. at 382 (citation omitted).

Considering the case before us, it might be said that appellant did exactly what the Court in *Berghuis* advised and told Gantt simply that he did not want to talk with him about the robbery. On paper, the words "No, sir" seem clear enough. But, from appellant's demeanor as is seen on the recording of the interview, it is unclear that his response to Gantt's question asking whether he "[felt] like talking about anything related to the robbery," was an assertion he wanted to cut off the questioning or terminate the interview.[8] And we have before us a finding of fact that appellant at no time requested

[8] *See* 41 George E. Dix & John M. Schmolesky, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, § 16:155 at 221 (3d ed. 2011) (discussing relationship between *Miranda* and article 38.22 "right to terminate the interview at any time," and

that the interview cease or be terminated. The court's findings do not state it found Gantt's testimony at the suppression hearing to be credible, but it is clear from the tenor of the findings that the court did so. Asked directly about the questions he put to appellant before he administered the *Miranda* warnings, Gantt agreed that he considered appellant's response to his third question to be ambiguous and equivocal as an assertion of the right to remain silent. He agreed also that he then read appellant the *Miranda* warnings, "[i]n order to advise him of his rights and see if he wanted to waive them."[9] Considering the totality of the circumstances presented to the trial court and viewing its findings and the evidence in the light most favorable to its ruling, we find the record supports the trial court's resolution of appellant's complaint that he was questioned after he terminated the interview.[10]

The parties devote much of their briefing of appellant's first issue to the question of whether he was in custody during his interview. The State contends the Tarrant County detectives' thirty-minute recorded questioning of appellant at the Hood County jail did not

---

noting possibility that "terminating the interview and expressing a desire to remain silent may not always be the same. A suspect may wish to remain silent but consent to further exchanges with police or at least to listening to police statements and perhaps even questions"). The record does not contain a direct statement by appellant of his view of his response to Gantt's third question. We can say that in the recorded interview it is later clear that appellant had a great interest in knowing what Insall had told the detectives.

[9] See *Berghuis*, 560 U.S. at 381 (referring to permissible police practice of asking questions in response to ambiguous or equivocal statements by suspects, "to clarify whether the accused wants to invoke his or her *Miranda* rights" quoting *Davis*, 512 U.S. at 461-62).

[10] Our finding should not be read as expressing approval of Gantt's conduct of beginning the interview with questions regarding the suspected offense. *Cf. Carter v. State*, 309 S.W.3d 31 (Tex. Crim. App. 2010) (addressing impermissible "question first, warn later" interrogation practice).

constitute custodial interrogation. We see no need to address that question because of our conclusion appellant only ambiguously asserted a desire to end Gantt's questioning regarding the robbery.[11]

Appellant's first issue is overruled.

Second Issue: *Brady* and Michael Morton Act

In his second issue appellant argues the State violated the requirements of *Brady v. Maryland*[12] and the Michael Morton Act[13] by failing to disclose that the detectives doubted an air rifle seized in the search of appellant's uncle's house was the weapon brandished during the smoke shop robbery. Discussion of the issue requires some description of events during trial.

Appellant told the detectives in his recorded interview that the "gun" he carried into the smoke shop could be found at his uncle's house where he had been staying. A detective retrieved an air rifle from the uncle's house. In its opening statement, the State

[11] We note, however, that the court's conclusions of law contain an incorrect statement of law regarding custodial status. The court cites *Thai Ngoc Nguyen v. State*, 292 S.W.3d 671, 677 (Tex. Crim. App. 2009) for the proposition that a person who is already an inmate of a prison or jail for one offense, but who is questioned by law enforcement officers about a separate offense, is not "in custody" for the purposes of article 38.22 and the Fifth Amendment. We are sure the court intended to say that such a person is not *necessarily* in custody for those purposes, which is what the *Nguyen* opinion says. *See id*. (citing *Herrera v. State*, 241 S.W.3d 520 (Tex. Crim. App. 2007)) (italics ours). *See also Howes v. Fields,* 565 U.S. 499, 505, 132 S. Ct. 1181, 1187, 182 L. Ed. 2d 17 (2012) (Court has "repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial").

[12] 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[13] TEX. CODE CRIM. PROC. ANN. art. 39.14 (West Supp. 2017).

told the jury it would hear evidence that appellant "says it was a toy gun," but also would hear from detective Gantt, "who test fired this air rifle."

The evidence the State presented early in its case included many references to the weapon appellant carried. The smoke shop employees described their fears during the robbery that appellant would shoot them. One said he threatened to kill her if she did not follow instructions.

Later, outside the jury's presence, the State announced that Insall had just told prosecutors the air rifle was not the gun used in the robbery. The prosecutor said Insall told her that morning the weapon used "was a replica gun, not a pellet gun of any sort, . . . not able to be discharged in any way."

The State announced its intention to proceed only on the counts alleging robbery, abandoning the aggravated robbery counts. Appellant was called to the stand and gave testimony regarding his understanding of the effect of the State's abandonment of the aggravated robbery counts. In particular, he acknowledged his understanding that because of his previous conviction, the robbery charge, though a second-degree felony, would be enhanced to a first-degree felony. He also acknowledged the State had extended an "offer of five years to regular robbery," and he explicitly rejected that plea offer. The prosecutor also said the State had solicited a counteroffer from appellant, and had indicated willingness to "waive his repeat offender notice." She stated her understanding that appellant was not willing "to counter with even two years TDC." On inquiry by his counsel whether a "two-year offer" was something he would be interested in, appellant responded, "No, sir, it's not."

The trial continued, with the State presenting the detective who obtained the smoke shop's security camera recording of the robbery. The recording was admitted and played for the jury.

Insall was the State's next witness. She testified she and appellant committed the robbery. Asked about the gun they used, she said it was a "fake gun," said it came from her parents' home, and later described it as a "replica of a real gun." She said it was appellant's idea to bring a gun, and that he displayed it during the robbery. Asked if the shop's attendants seemed scared, she said "they were terrified."

Detective Gantt was the next witness. On direct examination, he described his interview of appellant and identified State's exhibit 1, the recording of the interview. Appellant raised two objections to the exhibit's admission. The first reiterated his contention the interview was conducted in violation of his right to remain silent, and the second asserted the requirements of section 3(a)(3) of article 38.22 had not been met.[14] After further testimony regarding the accuracy of the recording, the court admitted the exhibit, and it was played for the jury.

Appellant pursued a defensive theory that Insall and another male had committed the robbery, and appellant had confessed only to protect Insall. On cross examination of Gantt, appellant's counsel challenged the thoroughness of the detective's investigation. Counsel questioned Gantt extensively about his acceptance of appellant's statement during his interview to the effect that the gun used in the robbery could be found at his

[14] TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(3) (admissibility of statement requires proof of capability of electronic recording devise, competency of its operator, and accuracy and authenticity of recording).

uncle's house. Seeking to show that not every statement of appellant during the interview was accurate, counsel probed Gantt's belief that the weapon detectives retrieved from the uncle's house was the one used in the robbery. During that questioning, Gantt revealed that he did not believe the air rifle retrieved was the weapon used. Further probing the consequences of that revelation, counsel elicited from Gantt the statement that he and other detectives had discussed, in the days following its retrieval, the possibility that it was not the weapon used.

Gantt returned to the stand at the outset of testimony the next morning, and counsel resumed his inquiry about Gantt's investigation. No motion or objection was raised based on Gantt's failure to disclose to the District Attorney the detectives' doubts the weapon retrieved, and earlier described to the jury as a functioning air rifle, was not the weapon appellant carried into the smoke shop.

Brady holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The State has an affirmative duty under the Due Process Clause of the Fourteenth Amendment to disclose evidence favorable and material to a defendant's guilt or punishment. *Harm v. State,* 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). The State's disclosure obligation under *Brady* arises once exculpatory evidence comes into its possession, whether requested or not by the defendant. *Id.* The duty to disclose includes impeachment evidence, and applies to "favorable evidence known only to the police." *Id*. Reversible error under *Brady* requires a showing by the defendant that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld

evidence is favorable to the defendant; and (3) the evidence is material. *Pena v. State,* 353 S.W.3d 797, 809 (Tex. Crim. App. 2011).

The Michael Morton Act "creates a general, continuous duty of the State to disclose before, during, or after trial any discovery evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive." *Hart v. State,* Nos. 14-15-00468-CR & 14-15-00469-CR, 2016 Tex. App. LEXIS 9551, at *14 (Tex. App.—Houston [14th Dist.] Aug. 30, 2016, no pet.) (mem. op., not designated for publication) (citing Michael Morton Act, 83rd Leg., R.S., ch. 49, § 3, 2013 Tex. Sess. Law Serv. 1611 (codified as TEX. CODE CRIM. PROC. ANN. art. 39.14 (West Supp. 2014))); *Gonzales v. State,* No. 04-14-00222-CR, 2015 Tex. App. LEXIS 7267 (Tex. App.—San Antonio 2015, no pet.) (mem. op., not designated for publication). Under former law, the State's discovery burden required it to disclose to the defendant all exculpatory material or information relative to a matter involved in the action. *Gonzales,* 2015 Tex. App. LEXIS 7267, at *9 (citing *Brady,* 373 U.S. at 87).

The State argues appellant failed to preserve his *Brady*-Michael Morton Act complaint. Generally, preservation of trial court error for review on appeal requires that a party make a timely and specific request, objection, or motion in the trial court and obtain an adverse ruling from the trial court. TEX. R. APP. P. 33.1(a). With the exception of complaints involving systemic requirements, or rights that are waivable only, all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to meet the preservation requirements of appellate rule 33.1(a). *Mendez v. State,* 138 S.W.3d 334, 342 (Tex. Crim. App. 2004). Violation of non-waivable and systemic rights

constitutes fundamental error. *McLean v. State,* 312 S.W.3d 912, 916 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

Appellant acknowledges that case law makes *Brady* violations subject to the preservation-of-error requirement. *See Pena*, 353 S.W.3d at 809 (applying preservation rules to *Brady* violation complaint); *Ahn v. State*, No. 02-17-00004-CR, 2017 Tex. App. LEXIS 11411, at *18 (Tex. App.—Fort Worth Dec. 7, 2017, no pet) (mem. op., not designated for publication) (finding *Brady* and Michael Morton Act claims not preserved); *Spann v. State*, No. 09-07-00015-CR, 2008 Tex. App. LEXIS 7871, at *14-15 (Tex. App.—Beaumont Oct. 15, 2008, pet. ref'd) (mem. op., not designated for publication) (noting courts generally have found failure to request continuance when *Brady* violation first appears during trial "is relevant to whether the court may review" the violation on appeal).

But appellant sees the enactment of the Michael Morton Act as imposing "more expansive systemic requirements" on State actors who possess evidence. He argues "that the increased burdens placed on prosecutors and the legislative intent in enacting the Michael Morton Act modifies the preservation for state-suppressed evidence to fundamental error." Appellant urges us to "create a new rule for preservation" that complies with *Brady* and embraces the disclosure requirements created by the Legislature, by which violations of either would be treated as fundamental error. We decline appellant's invitation to create a new rule. The Fourteenth Court of Appeals rejected a contention that disclosure requirements created by the Michael Morton Act established systemic or fundamental rights. *Glover v. State,* 496 S.W.3d 812, 816 (Tex.

App.—Houston [14th Dist.] 2016, pet. ref'd). Appellant's arguments and authority[15] give us no reason to disagree with the Fourteenth Court.

The record reflects no timely request, objection or motion based on Gantt's failure to disclose the evidence the air rifle retrieved from appellant's uncle and "test fired" was not the weapon appellant used during the robbery.[16] TEX. R. APP. P. 33.1(a)(1). For that reason, we agree with the State's contention appellant's second issue presents nothing for our review, and so overrule the issue.

Third Issue: Sufficiency of Arrest Warrant

Appellant's third issue arises from his arrest by the Hood County deputy sheriff. The deputy testified he arrested appellant under the authority of an outstanding warrant. Appellant asserts he was unlawfully seized by the arresting deputy because the warrant did not name the offense and the arrest was not an authorized warrantless arrest. As a result, he argues, the trial court should have suppressed tangible evidence recovered from his person, as well as his recorded statement.

The arrest warrant named the offense appellant was accused of committing as "POSS MARIJ<2OZ." He argues "POSS MARIJ<2OZ" is not an offense under Texas law and the arrest therefore was warrantless.

---

[15] Appellant cites an ethics opinion, State Bar of Texas Committee on Professional Ethics Opinion No. 646, 78 Tex. B. J. 78 (January 2015), in support of his contention.

[16] We note it is clear to us that appellant's failure to raise an objection or motion regarding Gantt's non-disclosure was not inadvertent, but was a conscious strategic decision. In counsel's efforts to discredit Gantt's investigation and appellant's recorded interview, counsel made effective use of Gantt's failure to make the District Attorney aware of his doubts he had retrieved the actual weapon.

An arrest warrant is sufficient if, without regard to form, it states "the person is accused of some offense against the laws of this State, naming the offense." TEX. CODE CRIM. PROC. ANN. art. 15.02(2) (West 2015). A person who knowingly or intentionally possesses two ounces or less of a usable quantity of marijuana commits a Class B misdemeanor. TEX. HEALTH & SAFETY CODE ANN. § 481.121(a),(b)(1) (West 2017).

In *Jones v. State,* 568 S.W.2d 847 (Tex. Crim. App. 1978) the defendant was arrested under a warrant that named the offense as "AG. ROB. SER. INJ." On appeal the defendant argued "AG. ROB. SER. INJ." does not state an offense under the laws of Texas. 568 S.W.2d at 852. The Court of Criminal Appeals framed the "essential question" as whether "AG. ROB. SER. INJ" provided the defendant notice that he was charged with an offense. *Id.* at 853.

Based on the language of article 15.02, the court concluded the arrest warrant sufficiently named the offense of aggravated robbery under section 29.03(a)(1) of the Penal Code. *Id*. at 853-54. On the rationale the court applied in *Jones*, *id*., we likewise find "POSS MARIJ<2OZ" names the offense of possession of marijuana, less than two ounces and thus substantially and sufficiently named an offense under Texas law. We note, moreover, that according to the trial testimony of the arresting Hood County deputy, appellant was arrested also on a warrant for a parole violation.

Appellant's third issue is overruled.

Fourth Issue: Charge Error and Egregious Harm

Appellant's fourth issue asserts the court's charge on guilt-innocence contained error. The asserted error was not brought to the trial court's attention. Appellant may

raise the issue for the first time on appeal, but must show that it caused him egregious harm. *Sakil v. State,* 287 S.W.3d 23, 25-26 (Tex. Crim. App. 2009). We review for claimed charge error under the abuse of discretion standard. *See Wesbrook v. State,* 29 S.W.3d 103, 122 (Tex. Crim. App. 2000) (concerning failure to submit instruction). We apply a two-step analysis. *Abdnor v. State,* 871 S.W.2d 726, 731 (Tex. Crim. App. 1994); *see Sakil,* 287 S.W.3d at 25-26. We first determine whether error occurred. *See Abdnor,* 871 S.W.2d at 731-32. If error appears, we then determine whether sufficient harm resulted from the error to require reversal. *Id.*

Appellant's issue concerns the definitions of the culpable mental states "intentionally" and "knowingly" contained in the court's charge. He argues the charge improperly included the complete definitions of "intentionally" and "knowingly" set out in Penal Code section 6.03. TEX. PENAL CODE ANN. § 6.03(a),(b) (West 2011).

An offense may contain one or more of the conduct elements identified in section 6.03: the nature of the conduct, the result of the conduct, and the circumstances of the conduct. *Price v. State,* 457 S.W.3d 437, 441 (Tex. Crim. App. 2015); *McQueen v. State,* 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). In its charge, the trial court must tailor its language regarding culpable mental states to the conduct elements of the offense charged. *Price,* 457 S.W.3d at 441. A trial court errs when it fails to limit the culpable mental state definitions in the charge to the applicable conduct element or elements. *Id*. (citing *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

Appellant's contention is based on the premise that the robbery counts of which he was convicted do not contain a nature-of-conduct element. The premise is incorrect.

"[A]n assaultive offense by threat is a conduct-oriented offense, while an assaultive offense causing bodily injury is a result-oriented offense." *Garfias v. State*, 424 S.W.3d 54, 61 (Tex. Crim. App. 2014) (citing *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008)). Appellant was convicted of robbery as the offense is described in Penal Code section 29.02(a)(2), the two counts alleging he threatened or placed the two store employees in fear of imminent bodily injury or death.[17] Accordingly, the trial court did not err by including in the definitions of the culpable mental states those referring to the nature of conduct.

Appellant's fourth issue is overruled.

Conclusion

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

James T. Campbell
Justice

Do not publish.

[17] The evidence shows this is a case involving an "actual threat." *See, e.g., Cooper v. State,* 430 S.W.3d 426, 433-34 (Tex. Crim. App. 2014) (Keller, P.J., concurring) (comparing robbery cases involving proof of an actual threat with those established without such proof). As we have noted, one of the store employees testified appellant threatened to kill her if she did not follow his instructions.