In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00097-CR

JARROD WADE DEE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Cass County, Texas
Trial Court No. 2016F00112

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

After a jury found Jarrod Wade Dee guilty of invasive visual recording, it assessed his punishment at two years' confinement in prison. Dee appeals, maintaining that there was insufficient evidence to support the jury's verdict of guilt and that the trial court erred when it failed to include in its jury charge an instruction on the lesser-included offense of attempted invasive visual recording. Because (1) legally sufficient evidence supports the jury's verdict of guilt and (2) the jury instructions contained no error, we affirm the judgment of the trial court.

Alyssa Purifoy testified that, in 2015, she lived in Bloomburg, Texas, usually residing with her father, Alexander. Occasionally, Alyssa stayed with her mother, Deborah, who also lived in Bloomburg with her boyfriend, Dee. Alyssa explained that Deborah and Dee had lived together for about two years and that, during a portion of that time, Alyssa would occasionally stay overnight with the couple. On July 24, 2015, Alyssa spent the night at their home and, on waking the next morning, went to one of the home's two bathrooms to take a shower. Because there were only two bathrooms and multiple people in the home, Alyssa informed the others that she would be in the bathroom in the event that someone else needed the room before she began to shower. According to Alyssa, just before she entered the bathroom and took her shower, Dee had entered and then exited the bathroom. Alyssa said there was no "gap in-between" Dee's exit from the bathroom and her entry and that she was basically just "waiting for him to get out." According to Alyssa, the remainder of the day was normal; she watched television and then went to her father's house.

On July 31, 2015, Alyssa returned to her mother's home. Alyssa stated that Dee was "messing with the camera,"[1] while Deborah was watching him. Eventually, Deborah took the camera away from Dee, but initially found nothing noteworthy on it and returned it. But, when Dee kept working with the camera, she took it again and found the video at issue. Alyssa stated that, when Deborah searched the contents of the camera the second time, Dee looked "[n]ervous, following her around, making sure that she didn't find anything, [she guessed]." According to Alyssa, Deborah began yelling and "asking why, and then she handed [Alyssa] the camera" and said, "Watch that." Alyssa testified that the recording showed her in the bathroom, entering and exiting the shower on July 25, 2015. Following the incident, Alyssa asked her friend to take her to her father's house; the following day, she reported the incident at the police department. Alyssa testified that she did not expect this type of incident to occur, that she felt "hurt" and "violated" because of it, and that she "never thought [Dee] was someone that could do that to someone else."

The State offered, and the trial court admitted, the recording from Dee's camera. The video recording shows Alyssa entering the bathroom, preparing to take a shower, removing her clothing, entering the shower, exiting the shower, dressing, and then leaving the bathroom. After the recording was played for the jury, Alyssa was asked about an individual who could be partially seen at the beginning of the recording. The individual placed the camera, while it was recording, on what appeared to be a shelf or a cabinet, and then left the bathroom. Alyssa identified the person shown at the beginning of the recording as Dee, stating she was able to identify him because "he has tattoos on his hands." At the end of the recording, the same individual returned and took

[1]Alyssa stated that the camera belonged to Deborah.

the camera, at which time his face could be clearly seen. Alyssa testified she was certain that person was Dee.

(1) Legally Sufficient Evidence Supports the Jury's Verdict of Guilt

Dee contends that the evidence is legally insufficient to support the jury's verdict of guilt. According to Dee, the evidence is insufficient because there is no evidence that Alyssa ever saw Dee recording her or that he recorded her in the shower. The State maintains that, based on the recording of the incident and Alyssa's testimony that Dee was the individual seen in the recording, there existed sufficient evidence to support the jury's verdict of guilt.

In evaluating legal sufficiency in this case, we must review all the evidence in the light most favorable to the jury's verdict to determine whether any rational jury could have found, beyond a reasonable doubt, that Dee was guilty of the offense of invasive visual recording. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd) (citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge "sets out the law, is authorized by the indictment, does not

unnecessarily increase the State's burden of proof or unnecessarily restict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

Here, the State charged Dee with the offense of invasive visual recording pursuant to Section 21.15(b) of the Texas Penal Code.[2] The indictment against Dee stated, in part,

> [T]hat on or about the 25th day of July 2015, in the county and state aforesaid, and anterior to the presentment of this indictment, [Dee] did then and there intentionally and knowingly with intent to invade the privacy of [Alyssa] hereinafter styled complainant, and without the consent of the complainant, record by videotape a visual image of the complainant in a bathroom.

Thus, the State was required to prove that (1) on July 25, 2015, (2) Dee intentionally invaded Alyssa's privacy, (2) without her consent, (3) by making a recording of Alyssa (4) while she was in the bathroom. Dee has cited no law, nor have we found any, to support Dee's positions that Alyssa was required to see him record her or that the State must have shown that Dee recorded Alyssa while she was in the shower,[3] in order for the jury to find him guilty of the offense of invasive visual recording.

Despite Dee's contentions, the recording of the incident showed an individual placing a recording video camera in the bathroom and then returning to remove the camera shortly after

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[2]Section 21.15(b)(2) of the Texas Penal Code states that an individual commits the offense of invasive visual recording if, without the other person's consent and with the intent to invade the other person's privacy, the individual "photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another in the bathroom or changing room." TEX. PENAL CODE ANN. § 21.15(b)(2) (West Supp. 2016). The Texas Court of Criminal Appeals has upheld the constitutionality of Section 21.15(b)(2), finding that it is "narrowly drawn to protect substantial privacy interests—the provision that makes it a crime to 'photograph or . . . record[ ] . . . a visual image of another at a location that is a bathroom or private dressing room." *Ex parte Thompson*, 442 S.W.3d 325, 348–49 (Tex. Crim. App. 2014). However, the *Thompson* court also held that the offense of improper photography, previously found in Section 21.15(b)(1) of the Texas Penal Code, was facially unconstitutional because it was overbroad and infringed on protected First Amendment speech. *Id.* at 350–51.

[3]Dee does not complain of the adequacy of the State's proof as to any of the other elements of the offense.

Alyssa's private and revealing use of the bathroom. According to Alyssa, that person was Dee. Likewise, Alyssa testified that she was the person shown on the recording while she was in the bathroom at her mother's home on July 25, 2015, and that she felt violated by Dee's intrusion into what she considered a private setting. Moreover, the jurors were allowed to view the recording of the incident, giving them the opportunity to identify the people who were involved and observe their actions before, during, and after the alleged offense occurred.

Accordingly, we find sufficient evidence existed to support the jury's verdict of guilt. We overrule this point of error.

(2) The Jury Instructions Contained No Error

Dee also contends that the trial court erred when it failed to include a jury instruction on the lesser-included offense of attempted invasive visual recording. The State maintains that, once Dee made the recording, the offense was complete; thus, there was no necessity for the trial court to include a lesser-included-offense instruction in its charge to the jury.

Our review of an alleged jury charge error involves a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). Initially, we determine whether error occurred, and then "determine whether sufficient harm resulted from the error to require reversal." *Id*. at 731–32); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).[4]

[4]The level of harm that must be shown as having resulted from the erroneous jury instruction depends on whether the appellant properly objected to the error. *Abdnor*, 871 S.W.2d at 732. When a proper objection is made at trial, a reversal is required if there is "some harm" "calculated to injure the rights of defendant." *Id*. But, when the defendant fails to object to the charge, we will not reverse the jury-charge error unless the record shows "egregious harm" to the defendant. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005) (citing *Almanza*, 686 S.W.2d at 171). In determining whether the error caused egregious harm, we must decide whether the error created such harm that the appellant did not have a "fair and impartial trial." TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006); *Allen v. State*,

The appropriate test to be applied in determining whether an accused is entitled to an instruction on a lesser-included offense is as follows: (1) the lesser-included offense must be included in the proof necessary to establish the offense charged, and (2) some evidence must exist that would permit a jury rationally to find that if the accused is guilty, he is guilty only of the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). The evidence must be evaluated in the context of the entire record, and the reviewing court may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998).

"A person commits an offense [of criminal attempt] if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PENAL CODE ANN. § 15.01(a) (West 2011).[5] Criminal

253 S.W.3d 260, 264 (Tex. Crim. App. 2008); *Almanza*, 686 S.W.2d at 171; *Boones v. State*, 170 S.W.3d 653, 660 (Tex. App.—Texarkana 2005, no pet.).

In this case, Dee objected to the trial court's refusal to include an instruction on the lesser-included offense of attempted invasive visual recording. Thus, if this Court determines the trial court erred when it refused to grant Dee's request, "then reversal is required if the error is 'calculated to injure the rights of [Dee],' which means no more than that there must be some harm to the accused from the error." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (quoting *Almanza*, 686 S.W.2d at 171).

Generally, a defendant will affirmatively request a charge on a lesser-included offense, and the request must be in writing or "dictated to the court reporter in the presence of the court and the state's counsel, before the reading of the court's charge to the jury." TEX. CODE CRIM. PROC. ANN. art. 36.15 (West 2006). Here, Dee timely filed his written request for an instruction on the lesser-included offense of attempted invasive visual recording.

[5]Section 15.01 states,

> (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.
>
> (b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

attempt is considered a lesser-included-offense of the charged offense. TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006); *Hill v. State*, 521 S.W.2d 253, 255 (Tex. Crim. App. 1975). Thus, because Dee requested the lesser-included-offense instruction on attempted invasive visual recording, if there is evidence that would have persuaded the jury to find Dee guilty of only attempted invasive visual recording, then the trial court erred when it refused to include the lesser-included instruction.

In support of his position that the trial court erroneously omitted the lesser-included-offense instruction, Dee cites to *Miller*, maintaining that an accused person has the right to the inclusion of a jury instruction on any defensive issue that is raised by the evidence. *See Miller v. State*, 815 S.W.2d 582 (Tex. Crim. App. 1991).[6] Contrary to Dee's contention, a lesser-included-offense instruction is not necessarily considered a defensive issue. *Tolbert v. State*, 306 S.W.3d 776, 788 (Tex. Crim. App. 2010) ("Our case law is clear: requests for jury instructions on lesser-included offenses are not *per se* 'defensive' issues"). Regardless, the evidence does not support the inclusion of an instruction on attempted invasive visual recording. Alyssa's testimony, along with the recording of the incident, showed an individual identified as Dee placing a camera in the

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> (c) It is no defense to prosecution for criminal attempt that the offense was actually committed.
>
> (d) An offense under this section is one category lower than the offense attempted, and if the offense attempted is a state jail felony, the offense is a Class A misdemeanor.

TEX. PENAL CODE ANN. § 15.01.

[6]In *Miller*, appellant was convicted of the offense of kidnapping, and sentenced to ten years' confinement in prison. *Miller*, 815 S.W.2d at 583. The issue in that case was whether the trial court erred when it refused appellant's request to include in its jury charge an instruction regarding the mistake-of-fact defense. *Miller* is inapplicable to the issues presented in this case.

bathroom, Alyssa in varying states of dress in the bathroom, and an individual identified as Dee returning to the bathroom to retrieve the camera just minutes after Alyssa exited the bathroom. There was no evidence that Dee's actions "tend[ed] but fail[ed] to effect the commission of the offense intended"; instead, the charged offense was completed, making the lesser-included offense of attempted invasive visual recording inapplicable in this case. Thus, the trial court did not err when it denied Dee's request for the instruction.

We overrule this point of error.

We affirm the judgment of the trial court.

Josh R. Morriss, III
Chief Justice

Date Submitted: November 3, 2017
Date Decided: November 15, 2017

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