IN THE
TENTH COURT OF APPEALS

No. 10-16-00357-CR

DONAL EARL BURNS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2013-1161-C1

MEMORANDUM OPINION

In five issues, appellant, Donal Earl Burns, challenges his conviction for hindering secured creditors. *See* TEX. PENAL CODE ANN. § 32.33(b) (West 2016). Specifically, Burns contends that: (1) his conviction is not supported by legally- and factually-sufficient evidence; (2) the trial court failed to properly instruct the jury regarding the applicable culpable mental state; and (3) the trial court erred by assessing court costs against him because he is indigent, and because the assessment of court costs against indigent

criminal defendants violates the Equal Protection Clause of the United States Constitution. Because we overrule all of Burns's issues on appeal, we affirm.

I. BACKGROUND

Here, the indictment charged Burns with the following:

> **DONAL EARL BURNS** . . . on or about the 10th day of January, A.D. 2013 in said county and state did then and there, having theretofore signed a security agreement creating a security interest in property, namely an automobile [a pickup truck], destroy or harm and reduce the value of said property by removing parts or components from the automobile, without the effective consent of the secured party, namely, **AARON TUCKER**, and with intent to hinder enforcement of such security interest or lien, and the value of said property was $1,500 or more but less than $20,000.

(Emphasis in original). This matter was tried to a jury, and at the conclusion of the evidence, the jury found Burns guilty of the charged offense and assessed punishment at twenty-four months' incarceration in the State-Jail Division of the Texas Department of Criminal Justice with $5,000 in restitution. The trial court certified Burns's right of appeal, and this appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

In his first and second issues, Burns complains that the evidence supporting his conviction is legally- and factually-insufficient. Specifically, Burns contends the evidence is insufficient to show he acted with the requisite intent or removed parts or components from the pickup truck. We disagree.

A. Standard of Review and Applicable Law

In reviewing the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). This standard enables the fact finder to draw reasonable inferences from the evidence. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton*, 235 S.W.3d at 778. In performing our sufficiency review, we may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000) ("We resolve inconsistencies in the testimony in favor of the verdict."). Instead, we determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).

Section 32.33(b) of the Penal Code provides that a person commits the offense of hindering secured creditors if he "has signed a security agreement creating a security interest in property or a mortgage or deed of trust creating a lien on property" and "with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals,

encumbers, or otherwise harms or reduces the value of the property." TEX. PENAL CODE ANN. § 32.33(b).

B. Discussion

The record reflects that, on August 15, 2012, Burns bought a 2007 Ford F-250 pickup truck from Aaron's Autos—a used-car business owned by Tucker. Burns purchased the pickup truck for $8,000 with no down payment. With taxes, Burns owed $8,652 for the pickup truck. He signed an installment contract, financing the entire purchase price with fifty monthly payments of $275. After Burns had made three payments, Aaron's Autos received notice that Burns's insurance had been cancelled. This constituted a violation of the installment contract. Tucker testified that Aaron's Autos sent notice to Burns that he needed to purchase insurance immediately or else the pickup truck would be repossessed.[1] In response, Burns made a late payment to Aaron's Autos

[1] The December 6, 2012 notice sent to Burns specifically stated:

> Your obligation under the contract mentioned above is in default because of your failure to maintain insurance on the vehicle as required by the contract and security agreement. Please forward proof of Full Coverage IMMEDIATELY.
>
> Unless we receive insurance showing Aarons Autos as Lienholder and $500.00/$500.00 Comprehensive/Collision, we will accelerate the remaining unpaid principal balance and take whatever steps necessary to protect our rights under the contract, which may include among other remedies, seeking late charges, attorney's fees and interest.
>
> WE WILL NOT FINANCE A VEHICLE WITHOUT FULL COVERAGE INSURANCE.

in violation of the contract. Aaron's Autos informed Burns that the late payment also violated the underlying contract.

In November 2012, Burns became delinquent on his payments. Tucker testified that the last payment Burns made was on October 25, 2012. Subsequently, Burns called Aaron's Autos and stated that "he doesn't want the truck any longer, it's in his driveway, come get it." When a representative of Aaron's Autos went to get the pickup truck, it was not in Burns's driveway. Aaron's Autos then enlisted the services of a "repo guy" to find the pickup truck. According to Tucker,

> We put it out for repossession and the repo guy did not find it. We get a call roughly a week later from another repo company that I had never used, very random they called and said, "Hey, can we get this truck right now. We know where it is? Would you like for us to go get it?" I said, "Absolutely. We're looking for it. They can go get it."

The repossession company dropped the pickup truck off at Big Green Automotive, Aaron's Autos shop, and noted that the pickup truck was not running and was missing parts.

Tucker intended to fix the pickup truck and resell it; however, numerous critical components were missing. The doors on the pickup truck had been replaced with doors from an older model Ford pickup truck, and the replaced doors did not have locks. Additionally, the tailgate had been replaced and did not match the make and model of the purchased pickup truck. Tucker also testified that the following components had been removed from the pickup truck: valve covers, fuel injectors, the turbocharger, the

radiator, the drive shaft, the complete wiring harness, all the computers and electronics, the ABS pump, the transmission, the battery, and the front bumper. Tucker estimated that it would cost about $10,150 to repair or replace these items, excluding labor and costs. Realizing that the cost of repairs exceeded the value of the pickup truck, Tucker totaled the pickup truck and received $300 to scrap it. Tucker denied giving anyone permission to strip the truck of parts or to harm or devalue the vehicle in any form. Thereafter, Tucker filed a police report.

Dana Harris, formerly the general manager for Aaron's Autos, testified that he reviewed each page of the installment contract with Burns and had him initial each one. Harris recalled that the pickup truck in question was in good condition and fully operational when Burns purchased it. Harris later recounted a conversation he had with Burns regarding late payments. According to Harris, Burns was "really rude and said, 'You will not find your truck, and if you do, you will not recognize it.'" Harris interpreted Burns's statements to mean that he was going to "tear up" the pickup truck. Harris noted that his conversation with Burns took place about a month before Burns stated that he no longer wanted the pickup truck and directed Aaron's Autos to come pick it up from his driveway.

Viewing the evidence in the light most favorable to the verdict, a factfinder could have reasonably concluded that Burns's failure to pay as required or immediately return the pickup truck upon the demand of Aaron's Autos, his threat to Harris to conceal and

damage the pickup truck, and the actual and extensive damage that occurred while the pickup truck was in Burns's custody reflected that Burns intended to harm or reduce the value of property subject to a security agreement. *See* TEX. PENAL CODE ANN. § 32.33(b); *see also Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks*, 323 S.W.3d at 895; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 16-17. In other words, we hold that the evidence is legally sufficient to support Burns's conviction for hindering secured creditors. *See* TEX. PENAL CODE ANN. § 32.33(b); *see also Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks*, 323 S.W.3d at 895; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 16-17. We overrule his first issue.

C. Factual-Sufficiency of the Evidence

In his second issue, Burns contends that the evidence is factually insufficient to support his conviction. We note that the Court of Criminal Appeals has determined that factual sufficiency no longer applies in criminal cases. *See Brooks*, 323 S.W.3d at 902, 912 (concluding that there is "no meaningful distinction between the *Jackson v. Virginia* legal sufficiency standard and the . . . factual-sufficiency standard, and these two standards have become indistinguishable" and holding the following: "As the Court with final appellate jurisdiction in this State, we decide that the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis*, are

overruled"); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *see also Sanders v. State*, No. 10-14-00211-CR, 2015 Tex. App. LEXIS 4704, at *2 (Tex. App.—Waco May 7, 2015, pet. ref'd) (mem. op., not designated for publication). We therefore overrule Burns's second issue.

III. THE JURY CHARGE

In his third issue, Burns asserts that the trial court failed to properly instruct the jury regarding the applicable culpable mental state. Burns argues that he suffered egregious harm by the trial court's inclusion of definitions for both "intentionally" and "knowingly," even though hindering secured creditors involves only intentional conduct and is a result-oriented offense.

A. Applicable Law

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). If an error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Conversely, if error was not preserved at trial by a proper objection, as was the case here, a reversal will be granted only if the error presents egregious harm, meaning Burns did not receive a fair and impartial trial. *Id.* To obtain a reversal for jury-charge error, Burns must have suffered actual harm and

not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

In determining whether charge error has resulted in egregious harm, we consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and the weight of the probative evidence; (3) the final arguments of the parties; and (4) any other relevant information revealed by the trial court as a whole. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006).

B. Discussion

The State concedes that the jury charge erroneously defined the terms "intentionally" and "knowingly"; therefore, we must determine whether the error in the charge egregiously harmed Burns. In doing so, we consider the entire jury charge, the state of the evidence, the final arguments of the parties, and any other relevant information revealed by the record. *See Allen*, 253 S.W.3d at 264.

1. The Entire Jury Charge

In the abstract portion of the charge, the trial court provided the following definitions for "intentionally" and "knowingly":

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> 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.

However, in the application portion of the charge, the trial court correctly tailored the culpable mental state—intentionally—to the charged offense—hindering secured creditors.[2] *See* TEX. PENAL CODE ANN. § 32.33(b); *see also Lantz v. State*, 601 S.W.2d 374, 376 (Tex. Crim. App. 1980) ("As we read the statute, the necessary mental state is that an actor harbor the "intent to hinder enforcement of (an) interest or lien . . . ." (quoting TEX. PENAL CODE ANN. § 32.33(b))).

The Court of Criminal Appeals has held that an error in the abstract portion of the jury charge is not egregious where the application paragraph correctly instructs the jury. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999); *see Patrick v. State*, 906 S.W.2d

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[2] Indeed, the application portion of the jury charge correctly tailored the culpable mental state associated with hindering secured creditors as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 10th day of January, 2013, in McLennan County, Texas, the defendant DONAL EARL BURNS, did then and there, having theretofore signed a security agreement creating a security interest in property, namely, an automobile, destroy or harm and reduce the value of said property by removing parts or components from the automobile, without the effective consent of the secured party, namely, Aaron Tucker, and with intent to hinder enforcement of such security interest or lien, and the value of said property was $1,500 or more but less than $20,000, then you will find the defendant guilty as charged in the indictment.

See TEX. PENAL CODE ANN. § 32.33(b) (West 2016); *see also Lantz v. State*, 601 S.W.2d 374, 376 (Tex. Crim. App. 1980).

481, 493 (Tex. Crim. App. 1995); *see also Davis v. State*, No. 05-13-00200-CR, 2014 Tex. App. LEXIS 4778, at *33 (Tex. App.—Dallas May 1, 2014, pet. ref'd) (not designated for publication) ("Where the application paragraph of the charge correctly instructs the jury on the law applicable to the case, this mitigates against a finding that error in the abstract portion of the jury charge was egregious."). Furthermore, the inclusion of merely superfluous abstraction never produces reversible error in the court's charge because it has no effect on the jury's ability to implement fairly and accurately the commands of the application paragraph or paragraphs. *See Plata v. State*, 926 S.W.2d 300, 302-03 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234, 234 (Tex. Crim. App. 1991); *see also Garcia v. State*, No. 10-14-00028-CR, 2015 Tex. App. LEXIS 2175, at **5-6 (Tex. App.—Waco Mar. 5, 2015, pet. ref'd) (mem. op., not designated for publication). Because the application portion of the jury charge in this case correctly tailored the culpable-mental-state definition for hindering secured creditors, we cannot say that this factor weighs in favor of a finding of egregious harm. *See Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013) (noting that the *Almanza* analysis "is a fact specific one which should be done on a case-by-case basis"); *Allen*, 253 S.W.3d at 264; *Medina*, 7 S.W.3d at 640; *Plata*, 926 S.W.2d at 302-03; *see also Anderson v. State*, No. 10-14-00182-CR, 2015 Tex. App. LEXIS 11134, at *20 (Tex. App.—Waco Oct. 29, 2015, pet. ref'd) (mem. op., not designated for publication) (declining to find that appellant was egregiously harmed

because the application paragraph of the charge served to limit the culpable mental states to their relevant conduct elements).

2. The State of the Evidence

In arguing that the State's case was weak, Burns asserts that he vigorously disputed the State's evidence. However, as we concluded earlier, the evidence is sufficient to support Burns's conviction. Accordingly, we cannot say that this factor weighs in favor of egregious harm. *See Gelinas*, 398 S.W.3d at 710; *see also Allen*, 253 S.W.3d at 264.

3. Final Arguments

While there was some mentioning of intent, most of the arguments of counsel focused on the purported conduct and alleged inconsistencies in the testimony. In fact, counsel for Burns focused almost exclusively on inconsistencies in the testimony of several witnesses, including the tow-truck drivers and Tucker. Moreover, Burns's counsel suggested that someone other than Burns could have caused the damage, either before or after it was repossessed. In rebuttal, the State countered Burns's defensive theories. A review of the final arguments of counsel, in their totality, shows that the focus of the arguments was not on the culpable mental state, but rather on whether Burns was the perpetrator of the charged offense. Therefore, based on our review of the record, we cannot say that this factor clearly weighs in favor of egregious harm. *See Gelinas*, 398 S.W.3d at 710; *see also Allen*, 253 S.W.3d at 264.

4. Other Relevant Information

Burns notes that "[t]he record contains no 'other considerations' suggesting [he] suffered egregious harm from the trial court's errors." As such, Burns concedes that "this factor does not weigh in favor of a finding of egregious harm." *See Gelinas*, 398 S.W.3d at 710; *see also Allen*, 253 S.W.3d at 264.

5. Summary

After considering the aforementioned factors, we cannot say that the purported charge error affected the very basis of the case, deprived Burns of a valuable right, or vitally affected a defensive theory; as such, we conclude that the error was harmless. *See Gelinas*, 398 S.W.3d at 710; *Allen*, 253 S.W.3d at 264; *see also Stuhler*, 218 S.W.3d at 719; *Sanchez*, 209 S.W.3d at 121; *Almanza*, 686 S.W.2d at 171. Accordingly, we overrule Burns's third issue.

IV. COURT COSTS

In his fourth and fifth issues, Burns argues that the trial court erred in assessing court costs against him. First, Burns contends that he should not have to pay court costs because he is indigent. Burns also argues that the statutes authorizing the assessment of court costs against indigent criminal defendants are unconstitutional as applied to him and violate his right to equal protection because court costs are not assessed against indigent civil parties. *See, e.g., Campbell v. Wilder*, 487 S.W.3d 146, 152 (Tex. 2016) ("It is

an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence.").

This Court has, on several occasions, rejected substantially-similar arguments pertaining to the imposition of court costs for indigent criminal defendants. *See Martinez v. State*, 507 S.W.3d 914, 916-18 (Tex. App.—Waco 2016, no pet.); *see also Garcia v. State*, No. 10-16-00045-CR, 2017 Tex. App. LEXIS 195, at **15-16 (Tex. App.—Waco Jan. 11, 2017, pet. ref'd) (mem. op., not designated for publication); *Ferguson v. State*, No. 10-16-00231-CR, 2016 Tex. App. LEXIS 13540, at *2 (Tex. App.—Waco Dec. 21, 2016, pet. ref'd) (mem. op., not designated for publication); *Perez v. State*, No. 10-16-00029-CR, 2016 Tex. App. LEXIS 13537, at **7-8 (Tex. App.—Waco Dec. 21, 2016, pet. ref'd) (mem. op., not designated for publication). Therefore, in light of these decisions, we are not persuaded by Burns's arguments regarding court costs. *See Martinez*, 507 S.W.3d at 916-18; *see also Garcia*, 2017 Tex. App. LEXIS 195, at **15-16; *Ferguson*, 2016 Tex. App. LEXIS 13540, at *2; *Perez*, 2016 Tex. App. LEXIS 13537, at **7-8. Accordingly, we overrule his fourth and fifth issues.

V. CONCLUSION

Having overruled all of Burns's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed June 28, 2017
Do not publish
[CR25]

*(Chief Justice Gray concurs in the Court's judgment to the extent that it affirms the trial court's judgment of conviction and the sentence of Burns. He does not join the opinion. A separate opinion will not issue.)