IN THE
TENTH COURT OF APPEALS

No. 10-19-00214-CR

TONY OLIVAREZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2017-832-C2

MEMORANDUM OPINION

Tony Olivarez was convicted of capital murder of more than one individual during the same criminal transaction. *See* TEX. PENAL CODE 19.03(a)(7)(A). He was sentenced to life in prison. Because an instruction by the trial court to the jury was not egregiously harmful, but the trial court erred in assessing ninety percent of the time payment fee as cost, the trial court's judgment is modified to delete part of that fee and affirmed as modified.

JURY CHARGE ERROR

In his first issue, Olivarez contends the trial court erred in instructing the jury on section 7.02(b) of the Texas Penal Code, the conspiring party instruction. Specifically, Olivarez asserts that section 19.03 of the Texas Penal Code, which sets forth the elements of capital murder, incorporates section 19.02(b)(1), which, in turn, establishes the *mens rea* for murder: "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual." TEX. PENAL CODE §§ 19.02(b)(1), 19.03. But, his argument continues, section 7.02(b)[1] eliminates the *mens rea* element of capital murder which is erroneous and egregiously harmful.[2] Olivarez did not object to the charge.

In reviewing a jury-charge issue, if error is found, the appellate court must analyze that error for harm. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). If error was not preserved at trial by proper objection, a reversal will be granted only if the error presents egregious harm, meaning the defendant did not receive a fair and impartial trial. *Almanza*, 686 S.W.2d at 171. To obtain a reversal for jury-charge error, the defendant must have

[1] Section 7.02(b) provides: "If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy."

[2] Under the concept of transferred intent, transferred mens rea, the nature of the differing conduct of the offenses does not require the same nature of conduct for the two offenses. Thus, the intent to commit a nature of conduct offense, such as a conspiracy, does not have to be the same as the intent to commit a result of conduct offense, such as murder. This is because of the way the intent to commit one felony, the mens rea, is statutorily transferred to another felony by section 7.02(b). This transfer of intent by section 7.02(b) has been challenged and held to not be unconstitutional. *See Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992). To the extent that appellant argues that the nature of the conspiracy must be a result of conduct offense, like murder, before 7.02(b) can transfer the intent, we disagree.

suffered actual harm and not 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).

The issue argued by Olivarez, while interesting, is academic because the charge to the jury did not authorize a conviction based on section 7.02(b), conspiracy.[3] "It is the application paragraph of the charge, not the abstract portion, that authorizes a conviction." *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013).

The problem in this case is that the abstract portion of the charge, not the application paragraphs, contained an unnecessary and inappropriate instruction on conspiracy. The instruction given is set out as follows:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

This language tracks section 7.02(b).

However, the application paragraphs have no connection to finding criminal liability on the basis of a conspiracy. The application paragraphs are based solely on liability as the primary actor or as a party; and as such, the jury was charged with finding

[3] Even if it did, it is well-settled that a person can be found guilty of capital murder as a party pursuant to section 7.02(b). *See Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) ("A person can be convicted of capital murder as a party to the offense, without having had the intent to commit the murder."); *Valle v. State*, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003) ("A defendant may be convicted of capital murder under § 7.02(b) without having the intent or actual anticipation that a human life would be taken."); *see also Turner v. State*, 414 S.W.3d 791, 797-98 (Tex. App.—Houston [1st Dist.] 2013), *aff'd as modified on other grounds*, 443 S.W.3d 128 (Tex. Crim. App. 2014); *Pollard v. State,* 392 S.W.3d 785, 800 (Tex. App.—Waco 2012, pet. ref'd); *Cienfuegos v. State*, 113 S.W.3d 481, 493 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

liability only if Olivarez intended to cause the death of multiple victims or if he was a party to the offense and the other actor intended the death of multiple victims. Thus, it was error for the trial court to include the instruction on conspiracy in the abstract portion of the charge when none of the application paragraphs authorized a conviction based on section 7.02(b), conspiracy.

Having found error, we move on to the harm analysis. Because Olivarez did not object to the jury charge, he must show egregious harm. *See Almanza*, 686 S.W.2d at 171. In examining the record for egregious harm, we consider the entire jury charge, the state of the evidence, the arguments of the parties, and any other relevant information revealed by the record of the trial as a whole. *Hollander v. State*, 414 S.W.3d 746, 749-50 (Tex. Crim. App. 2013). 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. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011).

Essentially, Olivarez argues he was egregiously harmed because the conspiracy instruction had the effect of allowing the jury to convict him without finding the necessary intent for capital murder and the evidence and argument of the State were filled with references to a conspiracy. We disagree that the instruction was egregiously harmful.

Error in the abstract portion of the charge is almost never harmful, especially when the application paragraphs correctly instruct the jury. *See Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999) ("Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious."). Here, the application paragraph of

the jury charge properly tracked the allegations in the indictment, and Olivarez does not argue that the application paragraph of the jury charge was erroneous in any way.

As stated previously, the only two theories of liability available to the jury through the application paragraphs of the charge were that Olivarez was either the primary actor or was a party to the offense. There was no reference in the application paragraphs to liability as a conspirator, and the theory of conspiracy was not submitted to the jury as a basis for criminal liability. As the primary actor or as a party, the jury was authorized to find criminal liability only if either Olivarez or the other actor intentionally or knowingly caused the death of the two victims. While the words conspire or conspiracy were used during the trial, that theory of criminal liability was not argued to the jury.[4]

Moreover, the evidence that Olivarez was, at the very least, a party to the murders was overwhelming. Not only was he present during the shootings, after he entered the apartment with the other actor, Olivarez locked the door behind them and put a gun to the head of one of the two witnesses to the murders.

Finally, this is one of those cases where the evidence supports the theory of two shooters and two victims but with the inability to tie a specific victim's death to a specific shooter. The State argued Olivarez was criminally liable as either the primary actor or a party and made no reference to the conspiracy instruction. Because of the overwhelming evidence of guilt at least as a party to the offense, there would have been no need to

[4] During arguments, while both sides talked about the timeline of crimes leading up to the murders, the only provision from the charge mentioned was 7.02(a), the charge on parties. Nothing about 7.02(b) was mentioned. No one stated in the timeline of events that there was a conspiracy to commit other crimes and capital murder was in furtherance of those crimes and should have been anticipated.

confuse the jury about referencing a conspiracy to commit some other felony not identified in the charge. In light of the entire record, we find the error in including the conspiracy instruction was, therefore, harmless.[5]

Olivarez's first issue is overruled.

FEE

In his second issue, Olivarez contends the trial court erred in assessing a time-payment fee under section 133.103(b) and (d) of the Local Government Code because the fee is unconstitutional. This Court has already held that ninety percent of the time-payment fee, as prescribed in section 133.103(b) and (d) of the Local Government Code, is unconstitutional, and the State has not convinced us otherwise. Thus, Olivarez's second issue is sustained in part. *See Simmons v. State*, 590 S.W.3d 702, 713 (Tex. App.—Waco 2019, pet. filed).

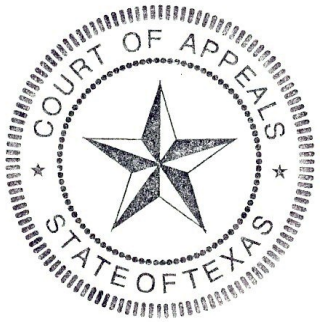
CONCLUSION

Having sustained, in part, Olivarez's second issue only, we modify the trial court's judgment to reduce the time payment fee from $25 to $2.50 which must be credited to the general fund of the county or municipality to be expended for the purpose of improving the efficiency of the administration of justice in the county or municipality pursuant to section 133.103(c) of the Local Government Code. No portion of the $2.50 may be credited

[5] Here, the jury would have had to expressly ignore the much more clear and correct theory of criminal liability as set out in the application paragraphs to convict on the one erroneous instruction in the abstract portion of the charge.

to the general revenue of the State of Texas. We, therefore, affirm the trial court's judgment as modified.

TOM GRAY
Chief Justice



Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed as modified
Opinion delivered November 12, 2020
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