IN THE
TENTH COURT OF APPEALS

No. 10-19-00363-CR

BRIAN CHRISTOPHER REED,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 361st District Court
Brazos County, Texas
Trial Court No. 14-01090-CRF-361

DISSENTING OPINION

This is one of those cases that turns on the evaluation of a number of factors to determine if the appellant was harmed as the result of unobjected to error in the charge. The issue in this case has to do with the submission of a charge on sexual assault and the lesser included offense of attempted sexual assault. There are various manner and means of committing the offense. The State limited its theory of liability to vaginal penetration with the defendant's sexual organ. That is how it was charged, thus limiting the jury's consideration to that single manner and means. But the experienced

trial court judge also recognized that the evidence supported a determination that if the defendant was guilty, he may be found guilty only of the lesser included offense of attempted sexual assault because the defendant denied any penetration with his sexual organ. So, the trial court included in the charge a lesser included application paragraph for attempted sexual assault.

It was a nearly perfect charge, except that the lesser included was not specifically limited to the manner and means of the greater offense as is necessary to properly submit a lesser included to the jury. It is an understandable oversight when neither party is helping the trial court[1] because neither wants that as an option. The State wants a guilty verdict on sexual assault. The defendant wants an acquittal on sexual assault with no other option for the jury. The jury rejected the greater offense and convicted on the lesser included.

The Court properly determines there is error in the charge. The specific error is that the application paragraph for the attempted sexual assault did not limit the theories of sexual assault that were attempted to only the theory of sexual assault submitted in the greater offense, penetration by the defendant's sexual organ.

In theory, the jury could have said the defendant did not penetrate the victim with his penis, nor did he attempt to, but rather he attempted (or completed) penetration in some other manner; thus, he is guilty of the lesser included on that other theory. That is the theory and the finding of error. Even though one has to be a mental gymnast to run past the greater offense to the lesser, and then do a back-flip back to the

[1] It is, after all, the court's charge.

abstract portion of the charge for the definition of sexual assault on all the other theories for how to commit sexual assault, before then vaulting over the specific theory to land on an attempt to commit sexual assault on a theory other than the greater offense, I do have to agree that is a possibility. Accordingly, I must concur in the determination of error.

Having determined error, we move to the harm analysis. This is where I diverge from my colleagues. I believe the error was harmless. Not only would the jury have to go through the mental gymnastics described, which is against the logical flow of the charge, it is the evidence and the arguments that convinces me that the defendant was not harmed by the error in the charge.

The Court discusses in its opinion the various factors we must evaluate to determine if the unobjected to error was egregiously harmful, and I will not reiterate that discussion in this dissenting opinion. In conducting the evaluation, the Court reviews the arguments of counsel. In my analysis, on this record, I apparently weigh that factor much more heavily than does the Court. In particular, no one argued that any manner and means of attempted sexual assault other than penetration with his sexual organ would support a conviction on the lesser included charge. In fact, no other manner and means of committing sexual assault was even eluded to during arguments. The State was going for broke, Sexual Assault, and spent no time arguing the lesser included when clearly the evidence would have supported such an argument. In summary, the State's argument for the lesser included could have been something like:

He stalked her from the restaurant, to the bar, to her home, to her

> bedroom. There he removed her clothes, he removed his clothes, he prepared her, and then got on top of her. But then she woke up and realized what was happening and fought him off. At the very least, he committed attempted sexual assault.

But that was not argued by the State. The State argued only for a conviction for sexual assault.

The Court also discusses the arguments by the defendant. The defendant's arguments were correct and properly limited the jury's consideration to the lesser included theory of sexual assault charged in the indictment, penetration with his sexual organ. The defendant argued that "attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful." Thus, it is not that the jury was without guidance on the limitation of the theory on which they could properly convict the defendant. It could be said that the defendant actually argued the hypothetically correct charge.

Therefore, in evaluating the various factors, which are properly set out in the Court's opinion, to determine if the defendant was egregiously harmed by the error in the court's charge, I come to the conclusion under the applicable standard of review that the error was harmless. I would, therefore, affirm the trial court's judgment. Because the Court reverses the trial court's judgment and remands this case for a new trial, I must, respectfully, dissent.

TOM GRAY
Chief Justice

Dissenting opinion delivered and filed August 26, 2020
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