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

OPINION

In three issues, appellant, Brian Christopher Reed, challenges his conviction for attempted sexual assault. *See* TEX. PENAL CODE ANN. § 21.011(a)(1). We reverse and remand.

I. BACKGROUND

This case involves a birthday celebration gone awry. On the evening of October 2, 2013, M.K., then a student at Texas A&M University, celebrated her twenty-third

birthday with several of her girlfriends. M.K. and her girlfriends went to Wings 'N More to eat and then later to The Tap bar. M.K. drank large amounts of alcohol that evening. In fact, by her own admission, M.K. was highly intoxicated when she left The Tap. Given her intoxicated state, M.K. returned to her condominium near the Texas A&M University sorority houses. M.K. said she went upstairs to her bedroom and fell asleep. M.K. awoke with somebody, later identified as Reed, on top of her.[1] M.K. recounted that, despite having pants on when she went to sleep, she was not wearing any pants or underwear when she awoke. M.K. believed that Reed had raped her.[2] M.K. screamed for her roommate, Caitlin Scott, and pushed Reed off her. Caitlin pushed Reed out of the condominium while screaming and yelling. One of M.K.'s girlfriends, Cassidy Jackson, called the police.

After an investigation, Reed was charged by indictment with the sexual assault of M.K. by penetrating her sexual organ with his sexual organ. This case proceeded to trial. Prior to jury deliberations, the trial court included an instruction in the jury charge on the lesser-included offense of attempted sexual assault. At the conclusion of trial, the jury

[1] Trevor Allen had been invited over to the condominium by M.K.'s roommate, Caitlin Scott. Reed was a friend and co-worker of Allen's who accompanied Allen over to the condominium that night. Caitlin noted that, after arriving at the condominium, Reed asked to use the upstairs bathroom, which was across the hall from M.K.'s bedroom. Reed also testified that he had seen M.K. at The Tap bar that night.

[2] The means of the penetration of M.K.'s sexual organ was disputed at trial. M.K. and other witnesses for the State testified that Reed penetrated M.K.'s sexual organ with his sexual organ. However, Reed presented evidence, including his own testimony, that he did not penetrate M.K.'s sexual organ with his sexual organ, but rather performed oral sex on M.K. that evening.

found Reed guilty of the lesser-included offense of attempted sexual assault and assessed punishment at three-and-a-half years incarceration in the Institutional Division of the Texas Department of Criminal Justice with a $1,000 fine. The trial court certified Reed's right of appeal, and this appeal followed.

II. THE JURY CHARGE

In his first issue, Reed contends that the trial court erred by including in the jury charge the lesser-included offense of attempted sexual assault without limiting the means. We agree.

A. Jury-Charge Error

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 proper objection, as was the case here, a reversal will be granted only if the error presents egregious harm, meaning Reed did not receive a fair and impartial trial. *Id.* To obtain a reversal for jury-charge error, Reed 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).

"As a general rule, the instructions [in the jury charge] must . . . conform to allegations in the indictment." *Sanchez*, 376 S.W.3d at 773. The jury charge may not enlarge the offense alleged and authorize the jury to convict the defendant on a basis or theory permitted by the jury charge but not alleged in the indictment. *Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003); *see Fella v. State*, 573 S.W.2d 548, 548 (Tex. Crim. App. 1978) (holding that the trial court erred by authorizing the jury to find appellant guilty based on a theory not alleged in the indictment). The Court of Criminal Appeals has stated "the indictment [is] the basis for the allegations which must be proved and . . . the hypothetically correct jury charge for the case must be authorized by the indictment." *Gollihar v. State*, 46 S.W.3d 243, 245 (Tex. Crim. App. 2001) (quotations omitted). Furthermore, the "law as 'authorized by the indictment' includes the statutory elements of the offense 'as modified by the charging instrument.'" *Daugherty v. State*, 387 S.W.3d 654, 655 (Tex. Crim. App. 2013) (quoting *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000)). Therefore, "a hypothetically correct jury charge would not simply quote from the controlling statute." *Gollihar*, 46 S.W.3d at 245.

The *Gollihar* Court further explained that "when the statute defines alternative manner and means of committing an element and the indictment alleges only one of those methods, 'the law' for purposes of the hypothetically correct charge, is the single method alleged in the indictment." *Id.* "For example, although the State may be permitted to plead multiple statutory manner and means in the charging instrument, it could choose

to plead only one." *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). "However, in so doing, the State is required to prove that the defendant committed the alleged crime using that specific statutory manner and means, and it may not rely on any other statutory manner and means of committing the crime it did not plead in the charging instrument." *Id.* Accordingly, error exists when "the trial court improperly broaden[s] the indictment" with a jury charge that alleges alternative manner and means that were not pled in the indictment. *See Reed*, 117 S.W.3d at 265.

The indictment in this case alleged that on or about October 3, 2013, Reed "then and there intentionally or knowingly cause the penetration of the sexual organ of M.K. by *defendant's sexual organ*, without the consent of M.K." (Emphasis added). The abstract portion of the jury charge specifically defined the charged offense of sexual assault as follows: "Our law provided that a person commits the offense of Sexual Assault, if the person intentionally or knowingly causes the penetration of the anus or sexual organ of another person who is not the spouse of the actor *by any means*, without that person's consent." (Emphasis added). Regarding the charged offense of sexual assault, the application portion of the jury charge correctly tracked the language of the indictment. However, the application portion of the jury charge also provided the following instruction on attempted sexual assault, which was not requested by Reed:

> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about October 3, 2013 in Brazos County, Texas, the Defendant, Brian Reed, did then and there, with specific intent to commit the offense of Sexual Assault do an act which

> amounted to more than mere preparation that tended but failed to effect the commission of the offense intended, you will find the defendant guilty of the lesser-included offense of Attempted Sexual Assault.
>
> You are further instructed that it is no defense to criminal attempt if the Sexual Assault was actually committed.

A review of the entire jury charge reveals that the instruction corresponding with the alleged lesser-included offense of attempted sexual assault is erroneous because it does not contain the proper limiting language. In particular, unlike the greater offense that was restricted to the penetration of M.K.'s sexual organ by Reed's sexual organ, the instruction on attempted sexual assault merely references the generic definition for sexual assault, which, as defined in the charge, encompasses the penetration of the anus or sexual organ of another person who is not the spouse of the actor *by any means*, without that person's consent. In other words, the instruction on attempted sexual assault improperly broadened the indictment by alleging a manner and means that were not plead in the indictment. *See Reed*, 117 S.W.3d at 265.

This is of particular importance in this case because there were conflicting stories. The testimony of the State's witnesses supported the allegation that Reed penetrated M.K.'s sexual organ with his sexual organ without her consent. However, there was also evidence that Reed did not penetrate M.K.'s sexual organ with his sexual organ, but rather penetrated her sexual organ with his mouth. The broad instruction for attempted sexual assault, coupled with the conflicting stories supported by the evidence, allowed the jury to convict Reed on a theory not alleged in the indictment—that Reed penetrated

M.K.'s sexual organ with his mouth, rather than his sexual organ. *See id.*; *see also Thomas*, 444 S.W.3d at 8; *Gollihar*, 46 S.W.3d at 245; *Fella*, 573 S.W.2d at 548. Thus, we conclude that the jury-charge instruction corresponding with the allegation of attempted sexual assault was erroneous.

B. Harm Analysis

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).

1. The Entire Jury Charge

"A jury charge is fundamentally defective if it authorizes a conviction without requiring the jury to find all the elements of an offense beyond a reasonable doubt." *Sanchez v. State*, 182 S.W.3d 34, 63 (Tex. App.—San Antonio 2005), *aff'd*, 209 S.W.3d 117, 125 (Tex. Crim. App. 2006). "It is now axiomatic that a defendant is to be tried only on the crimes alleged in the indictment . . . ." *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994); *see Daugherty*, 387 S.W.3d at 665 ("The law as 'authorized by the indictment'

includes the statutory elements of the offense 'as modified by the charging instrument.'" (quoting *Curry*, 30 S.W.3d at 404)).

Viewed in its entirety, we conclude that the jury charge affected the very basis of the case because it allowed jurors to convict Reed on the belief that he penetrated M.K.'s sexual organ by means other than that alleged in the indictment—his sexual organ. The jury charge accurately quoted the statutory elements of the offense. However, the indictment modified the statutory elements of the applicable law so that the jury should have found Reed guilty of sexual assault only if it unanimously believed Reed penetrated M.K.'s sexual organ with his sexual organ. Similarly, with respect to the allegation of attempted sexual assault, the jury charge should have confined the analysis to whether Reed tried, but failed, to commit the offense of sexual assault, as alleged in the indictment, by penetrating M.K.'s sexual organ with his sexual organ. Because the instruction on attempted sexual assault allowed the jury to consider the penetration of M.K.'s sexual organ by any means, including Reed's mouth, the jury charge improperly broadened the means by which the jury was authorized to convict Reed; thus, the charge did not comport with the indictment. And as such, there is a significant possibility that Reed was convicted without the jury unanimously agreeing on the essential fact that he tried, but failed, to penetrate M.K.'s sexual organ with his sexual organ. *See Abdnor*, 871 S.W.2d at 731 ("[A]n erroneous or an incomplete jury charge jeopardizes a defendant's right to jury trial because it fails to properly guide the jury in its fact-finding function.").

2. The State of the Evidence and Counsel's Arguments

"One of [the] considerations in the determination of egregious harm is whether the error related to a contested issue." *Hutch*, 922 S.W.2d at 172 (quotations omitted). "When the error relates to an incidental defensive theory rather than an obviously contested issue, the harm is less likely to be egregious." *Hines v. State*, 535 S.W.3d 102, 114 (Tex. App.—Eastland 2017, pet. ref'd).

The record reflects that the means of penetration was contested throughout trial. As noted above, the testimony of the State's witnesses supported the allegation that Reed penetrated M.K.'s sexual organ with his sexual organ without her consent. However, Reed testified that he did not penetrate M.K.'s sexual organ with his sexual organ, but rather penetrated her sexual organ with his mouth. Throughout trial and closing arguments, Reed's counsel specifically argued that Reed could only be convicted if the jury found that he penetrated M.K.'s sexual organ with his sexual organ without consent or, with respect to "attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful. That's what that would mean." The State, on the other hand, emphasized that the evidence supported a finding that Reed penetrated M.K.'s sexual organ with his sexual organ. The State did not mention in closing arguments Reed's admission that he performed oral sex on M.K. that night.

Based on the foregoing, we conclude that the jury charge affected the very basis of the case; thus, we hold that the erroneous charge resulted in Reed suffering egregious

harm. *See Stuhler*, 218 S.W.3d at 719; *Sanchez*, 209 S.W.3d at 121; *Almanza*, 686 S.W.2d at 171; *see also Lampkin v. State*, 607 S.W.2d 550, 551 (Tex. Crim. App. [Panel Op.] 1980) (holding that it is reversible error, even without objection at trial, when the jury charge allows the jury to convict the defendant on a different theory than what was alleged in the indictment). We sustain Reed's first issue.[3]

III. CONCLUSION

We reverse the judgment of the trial court and remand the cause for a new trial.

JOHN E. NEILL
Justice

Before Chief Justice Gray
Justice Davis, and
Justice Neill
(Chief Justice Gray dissenting)
Reversed and remanded
Opinion delivered and filed August 26, 2020
Publish
[CR25]

[3] We do not address Reed's remaining issues, as his first issue is dispositive in the outcome of this appeal.