NUMBER 13-14-00683-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CHRISTOPHER SIEBERT, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 94th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

A Nueces County jury found appellant Christopher Siebert guilty of the offense of unauthorized use of a vehicle, and the trial court sentenced him to fifteen years in prison enhanced by a prior felony conviction. *See* TEX. PENAL CODE ANN. §31.07(a) (West, Westlaw through 2015 R.S.). By three issues, Siebert contends that: (1) the evidence

was legally insufficient to support his conviction; (2) the jury charge was erroneous; and (3) his trial counsel was ineffective. We affirm.

I. BACKGROUND

On the evening of January 4, 2014, Mary Saylor's truck went missing from the parking lot of a hospital while she visited her husband, who was receiving treatment inside the hospital. The following day, at approximately 1:00 p.m., police officers responded to a call concerning a burglary of a vehicle occurring in the parking lot of a grocery store. By the time police officers arrived at the grocery store, the suspected burglar had already removed items from the burglarized vehicle and fled the scene in a truck, the same truck that Saylor reported as stolen the previous evening. Moments later, officers stopped this truck and arrested Siebert, the truck's sole occupant. When the arresting officer asked Siebert to provide information regarding how he came to possess the truck, Siebert responded: "a guy loaned me the truck." Siebert provided no other information at that time.

According to Saylor, the radiator of her truck had to be fixed after it was returned to her. However, there was nothing on the face of the truck to indicate that Siebert obtained access to the truck through forced entry of any kind; instead, Siebert was found operating the truck using the same set of spare keys reserved for Saylor's husband. Regarding how someone might have obtained the spare set of keys, Saylor surmised that they must have accidently fallen out of the pocket area of a jacket that she brought to her husband on the evening that her truck went missing. Saylor testified that neither she nor her husband knew Siebert personally, that she did not give Siebert any key to the truck, and that she did not give him permission to use the truck.

The jury heard this evidence and found Siebert guilty of unauthorized use of Saylor's truck. *See id*. This appeal followed.

II. LEGAL SUFFICIENCY

By his first issue, Siebert contends that the evidence is legally insufficient to support his conviction for unauthorized use of a vehicle.

In reviewing the legal sufficiency of the evidence to support a criminal conviction, we view the evidence in the light most favorable to the prosecution and then ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 902 n.19 (Tex. Crim. App. 2010) (plurality op.).

A person commits the offense of unauthorized use of a vehicle if: (1) he intentionally or knowingly operates another's vehicle; and (2) knowing that the owner of the vehicle has not consented to such operation. *See* TEX. PENAL CODE ANN. § 31.07(a); *see also McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). As applied to this case, a person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. *See* TEX. PENAL CODE ANN. § 6.03(a) (West, Westlaw through 2015 R.S.). 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. *See id*. § 6.03(b).

Thus, to support a conviction for unauthorized use of a vehicle, the evidence in this case had to show that Siebert was aware that Saylor did not consent to his operation of her truck. *See* TEX. PENAL CODE ANN. § 31.07(a). In *McQueen v. State*, the court of criminal appeals held that a motorcycle owner's testimony that he did not consent to the

defendant's operation of his motorcycle was legally sufficient to establish the defendant's awareness that he lacked the motorcycle owner's consent. 781 S.W.2d 600, 604–05 (Tex. Crim. App. 1989). Here, Saylor testified unequivocally that she did not consent to Siebert's operation of her truck. We conclude, as did the *McQueen* Court, that this testimony provides legally sufficient evidence supporting Siebert's awareness of Saylor's non-consent. *See id*.

Siebert responds that no rational jury could have found that he knew that Saylor had not consented because there was no damage to the face of the truck that would have led him or any "objective occupier of the [truck]" to conclude that someone had recently broken into it. However, based on the evidence that the State presented, the jury could have reasonably found that Siebert was the person who drove Saylor's truck out of the hospital parking lot by using the key that fell out of Saylor's husband's jacket. This would explain to a rational jury why Siebert was able to operate the truck without breaking into it. Furthermore, although Siebert claimed that an unidentified person "loaned" him the truck, the jury, as the fact finder, was not required to accept Siebert's version of the events as true. *See Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993) (explaining that "the evidence is not rendered insufficient simply because [defendant] presented a different version of the events").

Viewing the evidence in the light most favorable to the jury's verdict, the evidence is legally sufficient to support the jury's finding that Siebert knew that Saylor had not consented to his operation of her truck. *See Jackson*, 443 U.S. at 319. We therefore overrule Siebert's first issue.

III. JURY CHARGE

By his second issue, Siebert contends that the trial court erroneously defined the culpable mental states of "intentionally" and "knowingly" in the jury charge. Specifically, he contends that the trial court failed to properly tailor the definitions of those culpable mental states to the applicable conduct elements for unauthorized use of a vehicle. Siebert asserts that the trial court's error calls for a new trial.

A. Did the Trial Court Err?

The trial court has a duty to deliver to the jury a written jury charge distinctly setting forth the "law applicable to the case." TEX. CODE CRIM. PROC. art. 36.14 (West, Westlaw through 2015 R.S.). A statutorily defined word or phrase must be included in the jury charge as part of the "law applicable to the case." *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011); *Villarreal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986). The law generally applicable to this case is found in penal code section 6.03, which defines "intentionally" and "knowingly" as follows:

> (a) 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.
>
> (b) 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. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

See TEX. PENAL CODE ANN. § 6.03.

As shown above, these definitions encompass three "conduct elements," which may or may not be involved in any given offense and which the Legislature intended to criminalize: "(1) the nature of the conduct; (2) the result of the conduct; and (3) the

circumstances surrounding the conduct." *See McQueen*, 781 S.W.2d at 603. The nature-of-conduct element criminalizes specific acts because of their very nature, for example, gambling. *Id*. The result-of-conduct element criminalizes unspecified conduct that causes a result, for example, murder. *Id*. And the circumstances-surrounding-conduct element criminalizes otherwise innocent behavior because of the circumstances under which it is done, for example, theft. *Id*.

Any given criminal offense may contain one or more of these three conduct elements. *Id*. The offense of unauthorized use of a vehicle encompasses two of the three conduct elements—"that the defendant intentionally or knowingly operated a vehicle (nature of conduct) knowing that such operation was without the effective consent of the owner (circumstances surrounding conduct)." *Id.* at 604.

Here, the abstract portion of the jury charge set out verbatim the definitions of "intentionally" and "knowingly" in section 6.03, which included all three conduct elements. However, unauthorized use of a vehicle is not a result-of-conduct offense. *See id*. Consequently, the following result-of-conduct language should have been removed from the definitions of "intentionally" and "knowingly":

> (c) 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~~.
>
> (d) 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. ~~A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result~~.

By not removing this result-of-conduct language from the jury charge, the trial court provided the jury more abstract law than what is considered the "law applicable to the case." *See* TEX. CODE CRIM. PROC. art. 36.14. Technically, this constituted error because

a jury charge's definition of culpable mental states must be tailored to the conduct elements applicable to the charged offense. *See Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) (observing that, "[i]n a jury charge, the language in regard to the culpable mental state must be tailored to the conduct elements of the offense"). However, the State responds that a new trial is not the appropriate remedy because the error, if any, in the jury charge was harmless.

B. Was the Error Harmless?

When, as here, the defendant objects to an error in the jury charge for the first time on appeal, we may not order a new trial unless the record demonstrates that the defendant suffered "egregious" harm as a result of the error. *See Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). A defendant suffers egregious harm only when the error in the jury charge "affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Lovings v. State*, 376 S.W.3d 328, 337 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)). In making this determination, we consider the entire record, including: (1) the jury charge, (2) the arguments of counsel, (3) the entirety of the evidence, including the contested issues and weight of the probative evidence, and (4) any other relevant factors revealed by the record as a whole. *See Hollander v. State*, 414 S.W.3d 746, 749–50 (Tex. Crim. App. 2013).

With the forgoing considerations in mind, we must determine whether the jury charge's inclusion of result-of-conduct language in the jury charge egregiously harmed Siebert to such extent that it affected the very basis of the case, deprived him of a valuable right, or vitally affected his defensive theory. *See id*. As we understand his second issue, Siebert argues that the result-of-conduct language harmed him by "misdirecting" the jury

to apply the culpable mental states of the offense to the resulting damage to the truck's radiator instead of to the circumstance surrounding Saylor's non-consent. In other words, Siebert appears to be arguing that the improper result-of-conduct language might have confused the jurors to convict him of unauthorized use of a vehicle without first finding that he knew that Saylor did not consent to him operating the truck as long as the jurors were convinced that Siebert damaged the radiator. We fail to see how the result-of-conduct language could have confused the jury in this way.

First, nothing in the text of the jury charge overtly states or otherwise implies the existence of a damage element. The abstract portion of the jury charge defined the offense as follows: "A person commits the offense of unauthorized use of a vehicle if he intentionally or knowingly operates another's . . . vehicle without the effective consent of the owner." Nothing in this definition misleads the reader to believe that damage to the owner's vehicle is an element of the offense. The jury charge then set out the full definitions of "intentionally" and "knowingly"; although result-of-conduct language appears in those definitions, neither definition adds or otherwise implies a damage element to the offense. The application paragraph then asked the jury to apply the abstract law to the following conditional sentence:

> [I]f you believe [that Siebert] did then and there intentionally or knowingly operate a [vehicle] without the effective consent of Mary Saylor, the owner thereof, you will find [him] guilty of [unauthorized use of a vehicle].

As with the rest of the charge, nothing in this application paragraph expands the elements of the offense to include a damage element.

Moreover, the evidence and the argument of counsel did not confuse the jury that there was a damage element. Saylor testified in passing about damage to the radiator, and neither party argued that such damage was necessary to establish Siebert's guilt. In

fact, during closing argument, the State's attorney explicitly told the jury *"[w]e don't have to prove damage"* in making the case for Seibert's guilt. Finally, damage to the radiator formed no part of Siebert's defensive theory, which was that the allegedly shoddy police investigation gave the jury a reason to believe that Siebert innocently purchased the truck from an unknown seller not knowing that the truck was recently stolen from its true owner.

We conclude that the jury charge's inclusion of result-of-conduct language in the definitions of "intentionally" and "knowingly" did not egregiously harm Siebert to such extent that it affected the very basis of the case, deprived him of a valuable right, or vitally affected his defensive theory.[1] *See Ngo*, 175 S.W.3d at 743–44. We overrule Siebert's second issue.

IV. ASSISTANCE OF COUNSEL

By his third issue, Siebert contends that his trial counsel was ineffective: (1) for failing to object to the charge error made the basis of his second issue discussed above; and (2) for failing to object to the State's alleged misstatement of the law during closing argument.

A. Standard of Review

Strickland v. Washington sets forth a two-prong test for reviewing a claim of ineffective assistance of counsel. *See* 466 U.S. 668, 687 (1984). Under *Strickland's* first prong, a defendant must demonstrate that her counsel's performance was deficient in that it fell below an objective standard of reasonableness. *See id*. To make this showing, the defendant must identify the "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. The reviewing court

[1] Regarding the fourth harm factor, our review of the record has disclosed no other relevant information that requires our consideration, and Siebert provides none.

must then determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

Generally, if the record is silent as to why trial counsel engaged in the action being challenged as ineffective, there is a "strong presumption" that counsel's conduct was the result of sound trial strategy, falling within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Id*. at 814. Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. *See Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). Counsel usually must be afforded an opportunity to explain his challenged actions before a court concludes that his performance was deficient. *Id*. at 593. If trial counsel has not had such an opportunity, we will not find deficient performance unless the conduct "was so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Under *Strickland's* second prong, the defendant must demonstrate that counsel's deficient performance was so serious that it deprived him of a fair trial—i.e., a trial whose result is reliable. *See* 466 U.S. at 687. To demonstrate prejudice, the defendant must show that but for his trial counsel's deficient performance, there is a "reasonable probability" that the outcome of the trial would have been different. *Id*. at 694. A "reasonable probability" in this context refers to a "probability sufficient to undermine confidence in the outcome." *Id*.

B. Analysis

1. Failing to Object to Jury Charge

First, Siebert argues trial counsel was ineffective by failing to object to the jury charge's inclusion of result-of-conduct language in the definitions of "intentionally" and "knowingly." The standard for "egregious harm—charge error that deprived the defendant of a fair trial—is essentially the same as the second prong of *Strickland*—counsel's error that deprived the defendant of a fair trial." *Schiffert v. State*, 257 S.W.3d 6, 20–21 (Tex. App.—Fort Worth 2008, pet. ref'd) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); *Strickland*, 466 U.S. at 687); *see also Paniagua v. State*, No. 13-08-00228-CR, 2010 WL 672886, at *7 (Tex. App.—Corpus Christi Feb. 25, 2010, no pet.) (mem. op., not designated for publication). Having already determined that the charge error did not deprive Siebert of a fair trial, we now hold that Siebert has failed to show that counsel's failure to object to the same charge error deprived him of a fair trial. *See Schiffert*, 257 S.W.3d at 20–21; *see also Paniagua*, 2010 WL 672886, at *7.

2. Failing to Object to Prosecutor's Closing Statement

Second, Siebert asserts that trial counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the elements of unauthorized use of a vehicle during closing argument; specifically, Siebert contends that the prosecutor misstated the second element of the offense, which, as previously noted, required the State to prove that Siebert knew that Saylor did not consent to his use of her truck. *See* TEX. PENAL CODE ANN. § 31.07(a); *see also McQueen*, 781 S.W.2d at 603. According to Siebert, the prosecutor's closing argument gave the jury the false impression that Siebert could be found guilty if: (1) he knew that he used a truck; and (2) Saylor did not consent—regardless of whether he *knew* that Saylor had not consented. Having thoroughly reviewed the record, it is

certainly conceivable that the jury got this impression after listening to the prosecutor's closing statement. However, when understood in the context of the entire closing statement, it is also conceivable that the prosecutor was inviting the jury to infer Siebert's awareness of Saylor's non-consent because the circumstantial evidence pointed to him being the one who stole Saylor's truck. The point we make here is only that reasonable minds may differ regarding whether the prosecutor's closing statement was a misstatement of law. In any event, even if the prosecutor misstated the law, Siebert's counsel has not been afforded an opportunity to explain his reasons for not objecting to the misstatement, and we do not find that trial counsel's conduct in this regard was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392.[2] We therefore hold that Siebert has not carried his burden on direct appeal of demonstrating that his trial counsel performed deficiently when he failed to object to the prosecutor's alleged misstatement of the law during closing argument. *See Strickland*, 466 U.S. at 688. We overrule Siebert's third issue.

V. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed this
22nd day of September, 2016.

[2] We note that an appellant whose attempt at a direct appeal is unsuccessful because of an undeveloped record is not without a potential remedy. Challenges requiring the development of a record to substantiate a claim, such as ineffective assistance of counsel, may be raised in an application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West, Westlaw through 2015 R.S.); *Rylander v. State*, 110 S.W.3d 107, 110 (Tex. Crim. App. 2003); *Cooper v. State*, 45 S.W.3d 77, 82 (Tex. Crim. App. 2001); *Ex parte Torres*, 943 S.W.2d 469, 476 (Tex. Crim. App. 1997).