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COURT OF CRIMINAL APPEALS
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PD-0572-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/10/2019
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VICTOR ORTIZ GONZALEZ,	§	
APPELLANT	§	
	§	
V.	§	**NO. _____**
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

STATE'S PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS IN CAUSE NUMBER 02-18-00179-CR REVERSING THE CONVICTION IN CAUSE NUMBER 1497894D IN THE 432ND JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS.

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STATE'S PETITION FOR DISCRETIONARY REVIEW

§ § §

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IDENTITY OF JUDGES, PARTIES AND COUNSELS

Trial Court Judge:

Hon. Ruben Gonzalez, Presiding Judge, 432nd Judicial District Court of Tarrant County, Texas

Parties to the Judgment:

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STATEMENT REGARDING ORAL ARGUMENT

The State does not believe that oral argument is necessary unless the Court deems it helpful to resolve these issues.

STATEMENT OF THE CASE

This case addresses whether the inclusion of an unalleged reckless culpable mental state in an application paragraph charging aggravated assault against a public servant can cause egregious harm when it could have been properly alleged as a lesser offense with no actual effect on the trial's outcome. This case further addresses whether egregious harm may arise when there is strong evidence supporting the culpable mental states alleged in the indictment and those states were emphasized at trial.

STATEMENT OF PROCEDURAL HISTORY

The appellant was convicted of aggravated assault against a public servant and evading arrest or detention with a vehicle. (C.R. I:61-62, R.R. V:25). The jury found the repeat offender allegation to be true, and sentenced him to forty-five years' confinement and a $10,000 fine for aggravated assault and twenty years' confinement and a $10,000 fine for evading arrest. (C.R. I:71-72; R.R. VII:4-6).

On May 9, 2019, the court of appeals held that the appellant suffered

egregious harm due to a lowering of the State's burden of proof because the jury was charged on an un-indicted reckless culpable mental state and the State argued that recklessness was sufficient to convict him. See ***Gonzalez v. State***, 2019 WL 2042573, at *6 (Tex. App. – Fort Worth May 9, 2019) (not designated for publication).[1]

STATEMENT OF FACTS

On April 24, 2017, someone stole property from a bait car on the west side of Fort Worth. (R.R. III:19). Auto theft detectives tracking the property requested patrol assistance. (R.R. III:19-20, 67). Officers Craig Chambers and Taylor Rogers responded and began searching for the car with the stolen property. (R.R. III:20-21, 67). Officer Kendall Harris (in a second patrol car) also began monitoring for the car with the stolen property. (R.R. IV:8).

Officers Chambers and Rogers observed a yellow Hummer which, based on the property tracker, they believed contained the stolen property. (R.R. III:21). It was also the only vehicle on the street. (R.R. III:21). After observing the Hummer

1 The court of appeals also found that the evidence was sufficient to support the jury's verdict that the appellant committed aggravated assault against a public servant under both the intentional and knowing culpable mental states; declined to address a repetitive fine challenge since it was reversing his aggravated assault conviction; and affirmed his conviction for evading arrest or detention. ***Gonzalez v. State***, 2019 WL 2042573, at *1, 6.

roll through a stop sign, the officers decided to initiate a traffic stop and Officer Chambers activated his overhead lights. (R.R. III:22-23, 67-68, IV:9). The Hummer driver responded by accelerating into a nearby gated apartment complex. (R.R. III:23, 68).

Despite the danger of parked cars and pedestrians, the Hummer driver sped through the parking lot until he reached a locked gate at the complex' end. (R.R. III:24-25, 69-70, IV:11). Officer Chambers positioned his patrol car on the Hummer's left side to block it and to keep the driver from fleeing. (R.R. III:26, 70-71, IV:11). Officer Harris, who had joined the pursuit, positioned his patrol car on the Hummer's right side. (R.R. IV:10-11).

Officer Rogers opened his door and began getting out to initiate a felony stop for evading arrest. (R.R. III:27, 71-72, IV:13). At this same point, the driver placed the Hummer into reverse hitting Officer Rogers and pinning him against his patrol car. (R.R. III:28-29, 72, IV;14). Officer Harris avoided injury only because he had just opened his door when it was pushed back. (R.R. IV:14). The driver accelerated forward before reversing a second time to push through the patrol cars. (R.R. III:30-31). He damaged both patrol cars in the process. (R.R. III:30, 72, IV:14).

The driver sped off the parking lot into a common area designed for pedestrians. (R.R. III:32, 75, IV:15). Officers Chambers and Rogers pursued on

foot commanding the driver to stop. (R.R. III:32, 74). They ended their foot pursuit when Officer Rogers began feeling severe pain in his right leg, right elbow and chest from being hit by the Hummer. (R.R. III:33, 76). He was later transported to the hospital for medical treatment. (R.R. III:34). Meanwhile, Officer Harris circled back around the complex where he saw the driver crash his Hummer into a structure and run away. (R.R. III:15). Officer Chambers testified that the Hummer was driven in a manner capable of causing serious bodily injury or death. (R.R. III:73, 76).

Crime scene officer Daniel Karna lifted fingerprints from the Hummer's driver-side exterior door and window, its rear cargo door, and its passenger-side rear door and window. (R.R. IV:33-34, 35). Latent print examiner Deborah Smith determined that fingerprints from the driver-side door and the rear cargo window matched the appellant's known fingerprints. (R.R. IV:65). Officer Rogers also identified the appellant as the driver in a photographic lineup. (R.R. IV:80-81).

Detective Christian Dominguez interviewed the appellant during which:

- The appellant's demeanor fluctuated as he learned new information;
- He changed his story;
- He admitted driving the Hummer; and
- He knew exactly where the police were situated before he put his Hummer in reverse.

(R.R. IV:86-88).

QUESTIONS FOR REVIEW

1. Can a jury charge applying an unalleged reckless culpable mental state for aggravated assault in a unitary application instruction cause egregious harm when applying that same reckless culpable mental state as a lesser-included offense would not even be error?

2. Can a jury charge applying an unalleged reckless culpable mental state for aggravated assault cause egregious harm when there is sufficient evidence justifying the defendant's conviction under the greater (and alleged) intentional or knowing culpable mental states?

3. Did the court of appeals properly apply the egregious harm factors by over-emphasizing the State's argument and not giving sufficient value to the evidence establishing the appellant's guilt under the intentional and knowingly culpable mental states?

REASONS FOR REVIEW

This Court should grant review because:

1. The court of appeals decided an important question of state law that should be settled by this Court: Can a jury charge applying an unalleged reckless culpable mental state for aggravated assault in a unitary application instruction cause egregious harm when applying that same reckless culpable mental state as a lesser-included offense would not even be error? See **Tex. R. App. P. 66.3(b)**.

2. The court of appeals decided an important question of state law that should be settled by this Court: Can a jury charge applying an unalleged reckless culpable mental state for aggravated assault cause egregious harm when there is sufficient evidence justifying the defendant's conviction under the greater (and alleged) intentional or knowing culpable mental states? See **Tex. R. App. P. 66.3(b)**.

3. The court of appeals' decision that the reckless culpable mental state's inclusion caused the appellant egregious harm failed to give full force to the evidentiary factor of this Court's egregious harm test. See **Tex.**

R. App. P. 66.3(c).

4. The court of appeals' decision conflicts with decisions by two other courts of appeals. See **Tex. R. App. P. 66.3(a)**.

ARGUMENT

The appellant was indicted for aggravated assault against a public servant alleging intentional and knowing culpable mental states. (C.R.I:5). The trial court's jury instructions included the reckless culpable mental state in its abstract and application paragraphs. (C.R. I:52, 55). The appellant did not object to these instructions. (R.R. V:4).

A. Expansion of Culpable Mental States in Aggravated Assault Cases

A criminal defendant is entitled to fair notice of the specific charged offense. ***Crenshaw v. State***, 378 S.W.3d 460, 465 (Tex. Crim. App. 2012); U.S. Const. amend. VI**; Tex. Const. art. I § 10**. Under this notice requirement, a trial court's jury instructions may not expand on the allegations set forth in the indictment, and authorize a conviction on a theory not alleged in that charging instrument. ***Rodriguez v. State***, 18 S.W.3d 228, 232 (Tex. Crim. App. 2000).

In *Reed v. State*, this Court addressed the situation where the trial court instructed the jury on all three aggravated assault culpable mental states –

intentional, knowingly and reckless – in a single application paragraph when the indictment only alleged the intentional and knowingly culpable mental states. See ***Reed v. State***, 117 S.W.3d 260, 261-65 (Tex. Crim. App. 2003). The Court concluded that the reckless culpable mental state's inclusion improperly broadened the State's indictment to allow conviction under an unalleged theory even though the aggravated assault statute permits conviction based on reckless conduct. ***Reed v. State***, 117 S.W.3d at 263-64, 265.

In *Hicks v. State*, this Court addressed the situation where the trial court applied the reckless culpable mental state in a separate lesser-included offense instruction rather than in a single application instruction with the alleged intentional and knowingly culpable mental states. See ***Hicks v. State***, 372 S.W.3d 649, 655-58 (Tex. Crim. App. 2012). The Court concluded that this separate instruction on reckless aggravated assault was proper even though intentional/knowingly aggravated assault and reckless aggravated assault have an identical punishment classification. ***Hicks v. State***, 372 S.W.3d at 657-58.

Reading *Hicks* and *Reed* in conjunction, when an aggravated assault indictment alleges only the intentional and knowingly culpable mental states, the trial court may not include the reckless culpable mental state in its main application paragraph, but may apply it through a lesser-included offense instruction. See ***Hicks v. State***, 372 S.W.3d at 657-68; ***Reed v. State***, 117 S.W.3d at 265.

B. Whether Erroneous Expansion of Culpable Mental State Constitutes Egregious Harm Has Not Been Addressed

The standard for reviewing jury charge errors depends on whether a defendant timely objected to the jury instructions. ***Marshall v. State***, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Unobjected-to jury charge error will not result in a reversal unless it is so egregious and created such harm that the defendant did not have a fair and impartial trial. ***Marshall v. State***, 479 S.W.3d at 843; ***Nava v. State***, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); ***Almanza v. State***, 686 S.W.2d at 171. A defendant must suffer "actual harm" rather than "theoretical harm"; and the error must have affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. ***Marshall v. State***, 479 S.W.3d at 843; ***Nava v. State***, 415 S.W.3d at 298; ***Almanza v. State***, 686 S.W.2d at 171.

The *Reed* Court did not address what level of harm arises from including the unalleged reckless culpable mental state in a single application paragraph; instead, the Court remanded it to the intermediate appellate court to determine harm. See ***Reed v. State***, 117 S.W.3d at 265.[2] Thus, the question left unconsidered by *Reed* is whether erroneously applying all three culpable mental states in a single application

2 The intermediate court of appeals applied the "some harm" test since that defendant had objected to the reckless culpable mental state's inclusion in the jury charge. See ***Reed v. State***, 2004 WL 225547, at *1 (Tex. App. – Dallas 2004, no pet.) (not designated for publication).

paragraph when the reckless culpable mental state could have properly been applied as a lesser offense rises to the level of egregious harm? Review is justified since egregious harm has not been addressed by this Court. See **Tex. R. App. P. 66.3(b)**.

C. No Egregious Harm Where Error Had No Practical Consequences

Egregious harm requires that a defendant suffers "actual harm" and not just "theoretical harm" from the jury charge error. ***Marshall v. State***, 479 S.W.3d at 843; ***Nava v. State***, 415 S.W.3d at 298; ***Almanza v. State***, 686 S.W.2d at 171. In this case, the trial court could have properly submitted this same reckless culpable mental state as a lesser-included offense of reckless aggravated assault without triggering the same improper indictment expansion issues. See ***Hicks v. State***, 372 S.W.3d at 657-58 (reckless aggravated assault is a lesser of intentional or knowing aggravated assault, and may be submitted even though indictment did not allege reckless culpable mental state). Additionally, had the trial court submitted reckless aggravated assault as a lesser-included offense and the jury only convicted the appellant of reckless aggravated assault, the appellant would have faced the same first-degree punishment classification/range. See **Tex. Penal Code §22.01(a)(1)**; **Tex. Penal Code §22.02(b)(2)(B)**. See also ***Landrian v. State***, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008) (intentional, knowing and reckless aggravated assault are "conceptually equivalent" because all three culpable mental states are strung

together in a single phrase within a single subsection of the statute).

Put simply, just by re-configuring the charge, the jury could have considered the same reckless culpable mental without it being error and could have reached the same punishment classification/range. Thus, it seems illogical that the erroneous inclusion of recklessness in a single paragraph caused the appellant any "actual harm" or deprived him of any vital defensive right.[3]

Review is justified because the issue of whether a defendant can suffer "actual harm" when the charge error has no practical consequences has not been addressed by this Court. See **Tex. R. App. P. 66.3(b)**.

D. No Egregious Harm Where Sufficient Evidence Supports Conviction Under Alleged Culpable Mental States

Egregious harm must be assayed considering the jury charge itself, the state of the evidence including contested issues, the argument of counsel and any other relevant information revealed by the record of the entire trial. ***Marshall v. State***, 479 S.W.3d at 843; ***Nava v. State***, 415 S.W.3d at 298; ***Almanza v. State***, 686 S.W.2d at 171. Where the charge contains alternative theories of culpability, an error's

3 Moreover, the appellant cannot claim that he lacked notice of the specific acts relied upon to constitute his reckless conduct because, unlike in *Reed*, his indictment alleges those specific reckless acts. See ***Reed v. State***, 117 S.W.3d at 265 (recklessness may not be included in the jury charge where specific acts constituting recklessness are not alleged in the indictment).

harmfulness is measured, at least in part, against the likelihood that the jury's verdict was based on the alternative theory of culpability not affected by the erroneous portions of the charge. ***Atkinson v. State***, 923 S.W.2d 21, 27 (Tex. Crim. App. 1996) *overruled on other grounds by* ***Motilla v. State***, 78 S.W.3d 352, 356-57 (Tex. Crim. App. 2002); ***Rivera v. State***, 12 S.W.3d 572, 577 (Tex. App. - San Antonio 2000, no pet.). No harm is shown where the (1) the evidence clearly supports the defendant's guilt under the alternate theories unaffected by the erroneous portion of the charge; (2) the State relies most heavily on the alternate theory; and (3) it is very likely the jury's verdict was based on the alternate theory. ***Rivera v. State***, 12 S.W.3d at 577.

The court of appeals concluded that the appellant suffered egregious harm from the reckless culpable mental state's inclusion because the State repeatedly mentioned it as an applicable culpable mental state "co-equal with intentional or knowing conduct", stressed recklessness as an alternate theory if jury could not find intentional or knowing conduct, and told the jury that it did not have to agree on a culpable mental state. See ***Gonzalez v. State***, 2019 WL 2042573, at *5-6. This conclusion does not give full force to the strong evidence establishing that the appellant acted intentionally or knowingly in reversing his Hummer into the patrol cars and causing Officer Rogers' injuries, including that:

- The appellant admitted that he drove the Hummer that hit Officer Rogers. (R.R. IV:88).
- Once the appellant reached a locked gate at the end of the complex,

Officer Chambers and Officer Harris positioned their patrol cars to block him in on both sides and keep him from fleeing the scene. (R.R. III:25-6, 70-71, IV:11).

- Rather than await the police, the appellant chose to put his Hummer in reverse and back into both patrol cars. (R.R. III:27-29, 71-72, IV:14).
- The appellant pinned Officer Rogers against his patrol car causing injuries to his right leg, right elbow and chest. (R.R. III:28-29, 33, 35, 72, IV:14).
- The appellant avoided injuring Officer Harris because that officer had only just opened his door when it was pushed back. (R.R. IV:14).
- The appellant knew exactly where the patrol cars were located when he put his Hummer in reverse. (R.R. IV:88).
- After his initial contact with the patrol cars, the appellant chose to push his Hummer through them a second time. (R.R. III:30-31).
- The appellant used his Hummer in a manner capable of causing serious bodily injury or death. (R.R. III:73, 76).

This evidence, which the court of appeals found sufficient to support the appellant's conviction under an intentional or knowing culpable mental state[4], demonstrates a significant likelihood that the jury convicted the appellant of intentional or knowing aggravated assault and does not justify an egregious harm conclusion.

Furthermore, both prosecutor's closing arguments focused more heavily on the intentionality or knowingness of the appellant's conduct than on its possible recklessness. (R.R. V:8-9, 20-22). Thus, even the State's arguments alone do not justify an egregious harm conclusion.

The court of appeals' conclusion that the appellant suffered egregious harm from the trial court's inclusion of the reckless culpable mental state in its jury

4 See ***Gonzalez v. State***, 2019 WL 2042573, at *2-3.

instructions also conflicts with at least two other intermediate courts of appeals where there is strong evidence of intentionality or knowingness and those theories were emphasized to the jury. See ***Sierra v. State***, 2003 WL 21782285, at *2 (Tex. App. – San Antonio August 1, 2003, no pet.) (jury instructions' inclusion of reckless culpable state when it was omitted from the indictment did not cause defendant egregious harm where evidence compelling that defendant intentionally or knowingly caused the victim's bodily injury and the prosecutor relied heavily on the theories of intentional or knowing rather than recklessness); and ***Newman v. State***, 2017 WL 1175436, at *5-6 (Tex. App. – Dallas March 30, 2017, pet. refused) (defendant did not suffer egregious harm from inclusion of supplemental knowing culpable mental state where State emphasized intentional nature of defendant's conduct and the evidence supported a finding that the defendant acted intentionally).

Review is justified because the court of appeals did not give full force to the evidence supporting the appellant's guilt under the intentional and knowing culpable mental states or the State's arguments emphasizing those theories; thus, placing its decision in conflict with two other courts of appeal on this same issue. See **Tex. R. App. P. 66.3(b)**; **Tex. R. App. P. 66.3(a)**.

CONCLUSION

This Court should address whether erroneously applying all three culpable mental states in a single application paragraph when the reckless culpable mental state could have properly been applied as a lesser offense rises to the level of egregious harm. This Court should further address whether a defendant can suffer "actual harm" when the charge error has no practical consequences. Finally, this Court should review whether the court of appeals properly found that the appellant suffered egregious harm from the inclusion of the reckless culpable mental state when there is strong evidence supporting his guilt under the intentional and knowing culpable mental states and those theories were emphasized to the jury.

PRAYER

The State prays that this Court grant review in this cause, reverse the court of appeals' decision, and affirm the appellant's conviction for aggravated assault against a public servant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This petition for discretionary review has been electronically served on opposing counsel, Mr. Robert K. Gill (bob@gillbrisette.com), 201 Main Street, Suite 801, Fort Worth, Texas 76102, and on the State Prosecuting Attorney, Ms. Stacey Soule (Stacey.Soule@SPA.texas.gov), P.O. Box 13046, Capitol Station, Austin, Texas 78711-3046, on June 10, 2019.

/s/ Steven W. Conder
STEVEN W. CONDER

CERTIFICATE OF COMPLIANCE

This petition for discretionary review complies with the typeface and word count requirements of Tex. R. App. P. 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains approximately 2890 words, excluding those parts specifically

exempted, as computed by Microsoft Office Word 2013 - the computer program used to prepare the document.

/s/ Steven W. Conder
STEVEN W. CONDER

Appendix

2019 WL 2042573
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish Tex. R. App. P. 47.2(b)
Court of Appeals of Texas, Fort Worth.

Victor Ortiz GONZALEZ, Appellant
v.
The STATE of Texas

No. 02-18-00179-CR
|
Delivered: May 9, 2019

On Appeal from the 432nd District Court, Tarrant County, Texas, Trial Court No. 1497894D. Ruben Gonzalez, Judge.

Attorneys and Law Firms

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Sharen Wilson, Criminal District Attorney; Joseph W. Spence, Chief of Post Conviction; Steven W. Condor, Tim Rodgers, Jasmine Banks, Assistant Criminal District Attorneys for Tarrant County, Fort Worth, Texas, for State.

Before Gabriel, Kerr, and Pittman, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Justice Gabriel

***1** Appellant Victor Ortiz Gonzalez appeals from his convictions for aggravated assault against a public servant and for evading arrest or detention. He argues that his aggravated-assault conviction was supported by insufficient evidence and that the jury charge egregiously harmed him because it instructed the jury on a culpable mental state that was not alleged in the indictment. Finally, Appellant asserts that his $ 10,000 fine assessed for evading arrest must run concurrently with the $ 10,000 fine assessed for assault; thus, the order to withdraw funds incorporated into the evading judgment may only authorize withdrawal of one of the fines, not both. We conclude that the jury-charge error egregiously harmed Appellant and reverse the aggravated-assault judgment for further proceedings. Based on this holding we need not address Appellant's fine complaint, and we affirm the trial court's judgment convicting Appellant of evading arrest or detention.

I. BACKGROUND

A. THE OFFENSES

Officers Taylor Rogers and Craig Chambers were dispatched to locate a vehicle that had stolen merchandise inside. The merchandise, which was equipped with a tracking device, had been placed in a "bait" car by the police and then was stolen. [1] Rogers and Chambers quickly located the vehicle—a yellow Hummer—based on the merchandise's tracking device. After seeing the Hummer roll through a stop sign, Chambers turned on the patrol car's roof lights and initiated a traffic stop. The Hummer accelerated, "dust flying," after turning into an apartment complex's parking lot. One person in the parking lot had to run to get away from the Hummer. Chambers, who was driving the patrol car, sped after the Hummer. The Hummer sped to a locked gate and stopped. Chambers drove the patrol car to the driver's side of the Hummer, stopping the front of the patrol car close to and even with the Hummer's front bumper to keep the driver from getting out of the Hummer. Another officer, Kendall Harris, drove his patrol car close to and even with the passenger side of the Hummer. Harris saw Rogers put his right leg outside his patrol car to get out. The Hummer accelerated and began to reverse, pinning Rogers between the patrol car and the Hummer. Chambers yelled to alert Rogers that the Hummer was moving. Before Rogers could react, the driver of the Hummer looked in the rearview mirror, continued to accelerate, and reversed away from both patrol cars, damaging both. While the Hummer was reversing, Rogers can be heard on the dashboard video saying, "Ow, my leg." The Hummer also hit "several" other cars in the complex parking lot. Chambers and Rogers ran after the Hummer, but had to stop after Rogers's leg, elbow, and chest pain became severe. Harris saw the Hummer crash into a structure and saw the driver run away.

Fingerprints from the Hummer were matched to Appellant. Rogers was able to identify Appellant from a photo array as the driver of the Hummer. After a warrant was issued, Appellant was arrested. The investigating detective interviewed Appellant, and after first denying any involvement, Appellant admitted he was the driver of the Hummer. He also admitted that "he knew exactly where the officers' cars were at and that they were police officers behind him and around him, especially when he put ... the Hummer into reverse." When the investigating detective told Appellant that an officer had been hurt after Appellant pinned him between the patrol car and the Hummer, Appellant cried.

B. INDICTMENT AND TRIAL

***2** Appellant was indicted with the first-degree felony of aggravated assault of a public servant with a deadly weapon—the Hummer—and with the third-degree felony of evading arrest or detention with a vehicle—again, the Hummer.[2] *See* Tex. Penal Code Ann. §§ 22.02, 38.04 The indictment alleged that Appellant used the Hummer as a deadly weapon and contained a repeat-offender notice, alleging that Appellant had been convicted in 2005 of possessing one gram or more but less than four grams of methamphetamine—a third-degree felony. *See id.* § 12.42(a), (c)(1); Tex. Health & Safety Code Ann. § 481.115(c).

A jury found Appellant guilty of aggravated assault of a public servant with a deadly weapon, found Appellant guilty of evading arrest or detention, found that the deadly-weapon allegation regarding evading arrest or detention had been proved beyond a reasonable doubt, found that the repeat-offender notice was true,[3] and assessed his punishment at 45 years' confinement for assault and at 20 years' confinement for evading arrest or detention. The jury also assessed a $ 10,000 fine for each offense. The trial court entered judgments in accordance with the jury's verdicts, ordering the sentences to run concurrently. *See* Tex. Penal Code Ann. § 3.03(a). The incorporated order to withdraw funds authorized withdrawals from Gonzalez's inmate trust account for "[c]ourt costs, fees and/or fines and/or restitution ... in the amount of $ 20,319."[4]

Appellant filed a motion for new trial, arguing that "the verdict is contrary to the law and the evidence." *See* Tex. R. App. P. 21.3(h). The motion was deemed denied. *See* Tex. R. App. P. 21.8(c).

II. SUFFICIENCY OF THE EVIDENCE: AGGRAVATED ASSAULT

In his second point, Appellant argues that the evidence was insufficient to support a finding that he intentionally or knowingly committed aggravated assault. Appellant was charged with the intentional or knowing aggravated assault on a public servant—Rogers—while using a deadly weapon, which is a result-oriented offense. *See* Tex. Penal Code Ann. § 22.02(a), (b)(2)(B); *Shelby v. State*, 448 S.W.3d 431, 439 (Tex. Crim. App. 2014). A person acts intentionally with respect to the result of his conduct when it is his conscious objective or desire to cause the result. *See* Tex. Penal Code Ann. § 6.03(a). A person acts knowingly with respect to his conduct's result if he is aware that his conduct is reasonably certain to cause the result. *See id.* § 6.03(b). Appellant argues that even if Rogers's attempt to get out of the patrol car was obvious, no evidence shows Appellant "either intended to cause bodily injury or knew his actions were likely to result in bodily injury to ... Rogers." Appellant asserts that his obvious intent was to escape, not to injure Rogers. And he posits that it may be reasonably inferred from the evidence that he could not have expected Rogers to get out of the patrol car and was not aware that Rogers had been pinned between the patrol car and the Hummer.

In our due-process review of the sufficiency of the evidence to support Appellant's aggravated-assault conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). The trier of fact—here, the jury—is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, we may not substitute our judgment for the jury's by re-evaluating those implicit findings. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the

evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). We must presume that the jury resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

***3** Appellant admitted that he drove the Hummer and that he did not pull over when the patrol car tried to pull him over. Instead, he drove through the complex's parking lot at a high rate of speed to avoid arrest or detention and when he reached a dead end, he put his car in reverse and accelerated into both patrol cars that had tried to block him in. Appellant acknowledged that he knew the cars were police cars and that they were on either side of the Hummer when he reversed into them. Rogers was pinned between his patrol car and the Hummer, injuring his right leg, his right elbow, and his chest, which required medical treatment. When Appellant began to accelerate away, Rogers can be heard on the dashboard video saying that his leg was hurt. After crashing the Hummer, Appellant admitted he jumped out and ran away.

This evidence, viewed in the light most favorable to the verdict, allowed the jury to rationally infer that it was Appellant's conscious objective or desire to cause the result or that he was aware that his conduct was reasonably certain to cause the result. *See, e.g.*, *Onyinyechi v. State*, No. 01-16-00551-CR, 2017 WL 3027665, at *3–4 (Tex. App.—Houston [1st Dist.] July 18, 2017, pet. ref'd) (mem. op., not designated for publication); *Dominique v. State*, No. 01-09-00385-CR, 2010 WL 1571180, at *3–5 (Tex. App.—Houston [1st Dist.] Apr. 8, 2010, pet. ref'd) (mem. op., not designated for publication); *Mayfield v. State*, Nos. 09-07-005 CR, 09-07-006 CR, 09-07-007 CR, 2008 WL 4936889, at *4–5 (Tex. App.—Beaumont Nov. 19, 2008, no pet.) (mem. op., not designated for publication). Contrary to Appellant's arguments, we cannot credit inferences that the jury obviously did not nor can we ignore inferences that the jury implicitly drew. *See Murray*, 457 S.W.3d at 448–49; *see also Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) (recognizing jury may infer intent from defendant's words, acts, and conduct). A rational fact-finder could have found beyond a reasonable doubt that Appellant knew the police officers were intent on apprehending him and, out of necessity, would step out of their patrol cars after blocking his Hummer in. The fact-finder could have found beyond a reasonable doubt that Appellant acted intentionally or knowingly in injuring Rogers by reversing and accelerating into the patrol cars, knowing that they were there. We overrule Appellant's second point.

III. JURY-CHARGE ERROR: AGGRAVATED ASSAULT

In his first point, Appellant recognizes that he did not object to the jury charge and argues that he was egregiously harmed by the trial court's inclusion of a mental state that was not included in the aggravated-assault indictment—recklessness. The State "acknowledges that a trial court improperly broadens an indictment by including the reckless culpable mental state when the indictment just alleges the intentional and knowing culpable mental states even though the aggravated assault statute permits conviction based on reckless conduct." Indeed, the indictment alleged the culpable mental states of intentionally and knowingly, but the charge additionally instructed the jury on recklessness in the abstract and application paragraphs regarding aggravated assault. Accordingly, both Appellant and the State focus on whether Appellant suffered egregious harm, which is the appropriate standard for jury-charge error that was not objected to. *See* Tex. Code Crim. Proc. Ann. art. 36.19; *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013).

To make this fact-specific determination, we consider the entire charge; the state of the evidence, including contested issues and the weight of the probative evidence; the parties' jury arguments, including any statements made to the jury by the State, Appellant's counsel, or the trial court during trial; and any other relevant information in the record. *See Arrington v. State*, 451 S.W.3d 834, 840, 844 (Tex. Crim. App. 2015); *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 489–90 (Tex. Crim. App. 2011); *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996); *see also* Tex. Code Crim. Proc. Ann. art. 36.19. We look not for theoretical harm but for actual harm. *See Arrington*, 451 S.W.3d at 840, 844; *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). Egregious harm is a "high and difficult standard" to meet, and such a determination must be "borne out by the trial record." *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

A. THE ENTIRE JURY CHARGE

***4** In the abstract portion of the charge, the trial court defined intentional and knowing, but also defined recklessness. The abstract charge instructed that a person commits aggravated assault of a public servant if the person acts intentionally, knowingly, or recklessly. In the application paragraph, the charge again included recklessly along with intentionally and knowingly as applicable culpable mental states. *Cf. 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."); *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994) (holding court "may consider the degree, if any, to which the culpable mental states were limited by the application portions of the jury charge"). In sum, the charge authorized the jury to convict Appellant on a lesser culpable mental state than that with which he was charged, lowering the State's burden of proof. Nothing in the charge, such as the application paragraph for the offense at issue, lessened the effect of the error. This factor weighs in favor of egregious harm. *See Limon v. State*, No. 03-10-00666-CR, 2012 WL 5392160, at *3 (Tex. App.—Austin Nov. 2, 2012, no pet.) (mem. op., not designated for publication).

B. THE STATE OF THE EVIDENCE

As we discussed above, the evidence supported Appellant's guilt of either knowing or intentional conduct with respect to the result of his actions. *See Mabry v. State*, Nos. 02-13-00066-CR, 02-13-00067-CR, 2014 WL 4463117, at *6–7 (Tex. App.—Fort Worth Sept. 11, 2014, pet. ref'd) (mem. op., not designated for publication); *Rivera v. State*, 12 S.W.3d 572, 577 (Tex. App.—San Antonio 2000, pet. ref'd). Importantly, Appellant admitted that he knew police officers were trying to pull him over, that he sped off, and that he crashed into the police cars after he hit a dead end. *See Faulkenberry v. State*, No. 03-18-00265-CR, 2018 WL 3625791, at *5 (Tex. App.—Austin July 31, 2018, pet. ref'd) (mem. op., not designated for publication); *Russell v. State*, No. 05-00-01978-CR, 2002 WL 59264, at *6 (Tex. App.—Dallas Jan. 16, 2002, pet. ref'd) (not designated for publication). This factor weighs against egregious harm.

C. STATEMENTS TO THE JURY

During voir dire, the prosecutor argued that it had to prove that Appellant committed aggravated assault of a public servant intentionally, knowingly, or recklessly, but "[n]ot all three." He stressed to the venire that it could find Appellant guilty if it believed "he, at the most, intentionally or at the very least recklessly" committed the aggravated assault. The prosecutor defined "reckless" and then asked the venire what a driver could do that would equate to recklessness—consciously disregarding the likelihood of the result of the driver's conduct. *See* Tex. Penal Code Ann. § 6.03(c). At the end of several hypotheticals about reckless driving, the prosecutor asked if recklessness would "not [be] enough" for any of the veniremembers; several indicated that they were "good on reckless." However, Appellant's counsel also discussed recklessness in the context of driving, pointing out that almost any action done while driving could be considered reckless.

Before opening arguments, the prosecutor read the indictment to the jury and correctly read the two indicted culpable mental states—intentionally or knowingly. Recklessly was not mentioned. During his opening statement to the jury, Appellant's counsel stated that a "key element" of the State's case was whether the offense had been committed "intentionally, knowingly or reckless[ly]." However, the prosecutor argued to the jury in her opening statement that the evidence would show Appellant "intentionally uses his vehicle to commit assault against Officer Rogers that night."

That same prosecutor, in her closing argument, repeatedly mentioned recklessness as a culpable mental state that the jury was authorized to consider along with intentionally and knowingly:

> There are three state-of-mind requirements that are within aggravated assault of a public servant. You-all don't have to agree on the same state of mind. For example, four of you may decide that this defendant was reckless on April 24th, 2017. And reckless is defined basically as the Defendant is aware of a fact but consciously disregards that fact in his actions.
>
> ***5** ....

> You heard testimony that the Defendant was reckless in the way he drove his vehicle through that apartment complex, and he was reckless in reversing it into Officer Chambers' and Rogers' patrol vehicle and Officer Harris who testified as well. The four of you – four out of the twelve may decide the Defendant was reckless.
>
> Four of you may decide that the defendant acted knowingly in the aggravated assault on April 24th, 2017. The knowingly state of mind requirement is basically that the Defendant was aware his conduct was reasonably certain to cause a result and he disregarded that.
>
> The evidence we have for knowingly is really by the defendant's own admission ... that the police officers had parked behind him so close that he was unable to move.
>
> ....
>
> Four of you can decide the Defendant acted knowingly. The other four can decide the Defendant acted intentionally. There is sufficient evidence for that as well beyond a reasonable doubt....
>
> ....
>
> That's your intentionally state of mind. You all 12 don't have to agree on the same state of mind requirement.

The prosecutor further argued that the jury could convict Appellant of aggravated assault of a public servant if it found one of the three culpable mental states and stated that Appellant had been reckless by putting his car in reverse.

In Appellant's closing argument to the jury, counsel asserted that neither intentional nor knowing "fits in there" because Appellant did not "intend to hit that officer." Appellant's counsel further stated that "it [was] a reckless act to start to pull the car back." The second prosecutor, in his closing jury argument, mentioned the three culpable mental states, including recklessness, and argued that Appellant's conduct was "an intentional act" and "in the very least, knowingly is there." But he continued and asserted that evidence showing Appellant was "reckless is overwhelming."

We conclude that recklessness was repeatedly mentioned as an applicable culpable mental state, co-equal with intentional or knowing conduct. The State stressed recklessness as an alternative theory if the jury could not find intentional or knowing conduct. This factor weighs in favor of an egregious-harm finding. *See Kuhn v. State*, 393 S.W.3d 519, 530–31 (Tex. App.—Austin 2013, pet. ref'd); *Limon*, 2012 WL 5392160, at *3–4.

D. OTHER RELEVANT INFORMATION

Neither the State nor Appellant points to any other record information relevant to our harm analysis; but courts have considered things such as the jury's rejection of a charged count and whether the jury sent clarification requests during their deliberations. *See Flores v. State*, 513 S.W.3d 146, 161 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The jury convicted Appellant of both counts it considered and sent no clarification requests during its guilt deliberations. This factor is neutral.

E. SUMMARY OF HARM DETERMINATION

As we recognized earlier, egregious harm is a high hurdle to clear. *See Villarreal*, 453 S.W.3d at 433. Only if a jury-charge error affects "the very basis of the case, deprives the defendant of a valuable right [such as the right to a fair and impartial trial], or vitally affects a defensive theory" may we declare that egregious harm occurred. *State v. Ambrose*, 487 S.W.3d 587, 597 (Tex. Crim. App. 2016); *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016).

***6** The charge here was erroneous by including, defining, and applying a non-indicted culpable mental state for aggravated assault of a public servant. Both the State and Appellant argued the meaning and application of recklessness to the jury. The State argued that Appellant's actions were intentional and knowing but also that they were reckless. And after having questioned the venire during voir dire if the members could be "good" with reckless, the State argued to the jury in closing argument that the individual jurors did not have to agree on the culpable mental state (including recklessness) each believed had been proven. *Cf. Starks v. State*, No. 05-07-00944-CR, 2008 WL 4981633, at *2 (Tex. App.—Dallas Nov. 25, 2008, pet. ref'd) (mem. op., not designated

for publication) (finding no egregious harm after non-indicted mental state of recklessness was charged because "[r]ecklessness was not discussed at voir dire or in closing argument at guilt/innocence" and because "[t]here was no evidence that appellant acted recklessly during the incident").

Although the evidence supported Appellant's conviction under the charged mental states of intentionally or knowingly, the charge itself and the tenor of the trial lowered the State's burden to prove Appellant guilty beyond a reasonable doubt of the indicted offense. *Brown v. State*, No. 04-03-00009-CR, 2004 WL 383342, at *6 (Tex. App.—San Antonio Mar. 3, 2004), *pet. dism'd*, No. PD-0701-04, 2005 WL 1398609 (Tex. Crim. App. June 15, 2005) (per curiam) (not designated for publication). This deprived Appellant of a fair trial. We conclude that Appellant was egregiously harmed by the inclusion of recklessness in the charge as an applicable culpable mental state. *See Uddin v. State*, 503 S.W.3d 710, 717–22 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Riley v. State*, 447 S.W.3d 918, 928–30 (Tex. App.—Texarkana 2014, no pet.); *Limon*, 2012 WL 5392160, at *2–4; *Brown*, 2004 WL 383342, at *5–6.

We conclude that the evidence was sufficient to support the jury's verdict that Appellant intentionally or knowingly committed aggravated assault of a public servant. But by charging the jury on an un-indicted culpable mental state and by arguing to the jury that recklessness was sufficient to convict Appellant, especially where Appellant's mental state was a disputed fact issue, the charge egregiously harmed Appellant by lowering the State's burden of proof. We reverse the trial court's judgment convicting Appellant of aggravated assault of a public servant and remand for further proceedings. *See* Tex. R. App. P. 43.2(d).

Appellant also challenges his conviction for evading arrest or detention and points to the repetitive fine, which was also assessed as part of his concurrent aggravated-assault conviction. Because we are reversing the aggravated-assault judgment, including the imposed fine, we need not address Appellant's third issue and affirm the trial court's judgment convicting Appellant of evading arrest or detention. *See* Tex. R. App. P. 43.2(a).

IV. CONCLUSION

All Citations

Not Reported in S.W. Rptr., 2019 WL 2042573

Footnotes

1 Only the merchandise was stolen, not the bait car.

2 The indictment contained other counts arising from the same criminal episode; but these two counts were the only ones the State took to trial.

3 Appellant had pleaded true to the repeat-offender notice, and the trial court instructed the jury to find the notice true.

4 The assault judgment noted that Gonzalez was responsible for $ 319 in court costs.