



In the Court of Criminal Appeals of Texas

No. PD-0166-20

DANNY WAYNE ALCOSER,
Appellant,

v.

THE STATE OF TEXAS

On State's Petition for Discretionary Review
From the Seventh Court of Appeals
McLennan County

YEARY, J., filed a concurring opinion in which SLAUGHTER, J.,
joined.

The court of appeals reversed all three of Appellant's convictions
in this case on the basis of unobjected-to jury-charge error:

Assault/Family Violence, Child Endangerment, and Interference with an Emergency Request for Assistance. *Alcoser v. State*, 596 S.W.3d 320, 338 (Tex. App.—Amarillo 2019). It concluded that Appellant suffered egregious harm with respect to provisions in the jury charge relating to all three offenses. *Id.* at 329 (citing *Arteaga v. State*, 521 S.W.3d 329, 338 (Tex. Crim. App. 2017), for the proposition that when “the alleged error was not preserved by objection, Appellant can prevail only if he was egregiously harmed by an erroneous charge”); *id.* at 335–38.

On discretionary review, the State does not take issue with the court of appeals’ reversal of two of the convictions: Child Endangerment and Interference with an Emergency Request for Assistance. But it does argue that the way in which the court of appeals consolidated its analysis of the jury-charge errors with respect to all three convictions caused it to make mistakes in its analysis of whether Appellant suffered egregious harm with respect to his Assault/Family Violence conviction. We granted discretionary review to evaluate the State’s claim.

I. BACKGROUND

On appeal, Appellant raised two complaints about the jury charge, neither of which were raised by him in the trial court. First, he argued, the jury charge “failed to properly instruct the jury regarding the applicable culpable mental states[.]” *Id.* at 326. Second, he complained that it also “failed to properly instruct the jury on the law relating to self defense by not including an application paragraph and by omitting the definition of ‘reasonable belief.’” *Id.* In evaluating these appellate claims, however, the court of appeals did not limit itself to considering the particular flaws in the court’s charge that Appellant

specifically complained about.

Instead, the court of appeals provided a blow-by-blow description of the court’s charge, seemingly cataloging every flaw it could identify. These included: (1) failure to provide abstract-law paragraphs with respect to any offense other than simple assault, *id.* at 332; (2) failure to properly identify and allocate the applicable culpable mental state for each constituent offense, *id.* at 332–34; (3) a confusing placement of the self-defense charge, which created an ambiguity as to the scope of its application, *id.* at 334; and (4) failure to include in the self-defense instruction not just a definition of “reasonable belief,” as Appellant specifically complained about, but also an instruction on the “presumption of reasonableness” that is provided for by statute as well,¹ *id.* at 335. The court of appeals then seemed to factor all of those perceived errors into the egregious harm analysis, not just those errors about which Appellant had complained. Moreover, it failed to ascertain how each error may have adversely affected the jury’s ability to properly resolve *each* of the three charges against Appellant *individually*. What it did do was to consolidate its egregious harm analysis, and then it declared:

The jury was not properly instructed on any of the offenses. Instead, it received a hodge-podge of inappropriately defined terms and offenses. While this court acknowledges that egregious harm is a high and difficult standard, we conclude the multiple errors in the charge had the cumulative effect of depriving Appellant of a fair trial and

¹ See TEX. PENAL CODE § 9.31(a) (setting out circumstances that would justify an instruction to the jury regarding when it would be appropriate to “presume” that an actor’s use of force was “immediately necessary” to counteract another’s use of unlawful force against him).

vitally affected his defensive theory.

Id. (internal quotation marks omitted).

II. ANALYSIS

There are, in my view, two defects in the court of appeals' evaluation of Appellant's claims of egregiously harmful jury-charge error. First, I do not believe it was appropriate for the court of appeals to reach beyond those particular defects in the jury charge about which Appellant himself complained on appeal. It is one thing to permit the reversal of a conviction based on unobjected-to jury charge error so long as the record shows egregious harm, as *Almanza* has construed Article 36.19 to authorize. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); TEX. CODE CRIM. PROC. art. 36.19. But it is quite another thing for the appellate court to take on the adversarial role of appellate counsel and cull the jury charge for any and every potential error about which an appellant might plausibly complain.

I understand that this Court has said that courts of appeals have the authority to address "unassigned error" on appeal, including jury-charge errors not objected to at trial which nevertheless cause egregious harm. *Sanchez v. State*, 209 S.W.3d 117, 120–21 (Tex. Crim. App. 2006). But the court of appeals in this case did not declare itself to be addressing unassigned jury-charge error. Ordinarily, courts of appeals should limit their review to the particular claims of error that an appellant specifically complains about, and not incorporate other potential jury-charge errors as they see fit into the egregious harm analysis. What is more, even when they do overtly identify what they perceive to be unassigned, unobjected-to, but egregiously harmful jury-

charge error, courts of appeals should not reverse a conviction on the basis of such perceived error without giving due consideration to whether the parties should be afforded an opportunity to brief the issue. *Pena v. State*, 191 S.W.3d 133, 138 (Tex. Crim. App. 2006). That did not happen here.

Second, the court of appeals should have organized its analysis in such a way as to illustrate the impact of Appellant’s claimed jury-charge errors on each discrete offense of conviction. This would assure no confusing cross-pollination of issues and would make it clear how the specific jury-charge errors Appellant identified actually impacted the jury’s ability (if it did) to properly determine his guilt or innocence *for each individual offense*. The court of appeals’ consolidated analysis and “cumulative effect” conclusion is confusing, and it practically made discretionary review of this case inevitable.

I will limit myself to a review of Appellant’s Assault/Family Violence conviction, and to an evaluation *only* of the specific errors that Appellant’s appellate brief identified, and *only* as they potentially impacted the jury’s ability to properly evaluate his guilt or innocence with respect to *that* offense. By that more limited review, I concur in the Court’s judgment today finding a lack of egregious harm.

A. Improper Culpable Mental State

The jury charge properly instructed the jury that a person commits assault when he “intentionally or knowingly or recklessly causes bodily injury to another[.]” Such an assault, we have said, is a result-of-conduct offense. *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008). The abstract definition of “intentional” was limited to

the part of the definition of intentional as it applied to a “result of conduct” offense. It provided: “A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.” So, at least with regard to the offense of Assault/Family Violence, the mental state instruction in the jury charge was not erroneous.

It must be admitted that the definitions of “knowledge” and “recklessness” given in the charge were hopelessly muddled. This error did apply to the Assault/Family Violence case. And this might have complicated the jury’s evaluation of Appellant’s guilt for that offense if it had found the evidence to prove Appellant *intended* the result to be lacking. But the evidence was compelling that Appellant intended the result, and he essentially admitted so in his own testimony. Under these circumstances, I fail to see how Appellant could have suffered egregious harm by virtue of the faulty definitions of these terms.

B. Self-Defense

Whether Appellant suffered egregious harm with respect to the errors he specifically invoked with regard to the self-defense instruction is a closer question. First, he argued that the instruction failed to define “reasonable belief,” such that the jury would know to evaluate his conduct from the perspective of “an ordinary and prudent man in the same circumstances” as he found himself to be, at the moment of the assaultive conduct. TEX. PENAL CODE § 1.07(42). Second, he complained of the absence of an application paragraph instructing the jury how to apply the abstract law of self-defense under the facts of his case. The court of appeals held that, since the evidence did raise self-defense

(however implausibly), these omissions prejudiced Appellant’s assertion of the defense and therefore were factors weighing on the side of a finding of egregious harm. *Alcoser*, 596 S.W.3d at 336–37.

But to conclude that Appellant suffered egregious harm on the basis of these issues alone would amount to a reversal predicated on nothing more than “theoretical harm,” which, as the Court notes today, would be improper. Majority Opinion at 7 (citing *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011)). Whether the reasonableness of Appellant’s belief that unlawful force was necessary should be evaluated from any other perspective than Appellant’s own under the circumstances was neither hotly contested nor made an issue by the arguments of the parties. Indeed, the court of appeals’ discussion of the arguments of the parties makes no mention of any argument at all pertaining to self-defense. *Alcoser*, 596 S.W.3d at 337.

As for the absence of an application paragraph relating to self-defense, I do not believe this manifest error could have caused anything but theoretical harm either. There can be little doubt on the state of the record that the jury was aware that it must acquit Appellant if it believed his version of events and found that the facts justified his otherwise unlawful conduct. The abstract definition of self-defense explicitly told the jury that “[a] person’s use of force against another that would otherwise constitute the crime of Assault is not a criminal offense” if committed under circumstances that would constitute self-defense. The jury was also instructed in no uncertain terms that “the State must prove, beyond a reasonable doubt, that self-defense does not apply to the Defendant’s conduct.” Appellant’s counsel was therefore able to argue,

without contradiction, that the jury should acquit Appellant on the basis of self-defense.

A proper self-defense application paragraph would have been optimal, of course. But it is highly unlikely that the jury convicted Appellant in this case only because it did not realize it was required to acquit him if it found his conduct to be justified by self-defense. It is far more likely that the jury simply did not accept what the Court today characterizes as his far less credible version of the incident. Majority Opinion at 16.

III. CONCLUSION

For these more limited reasons, I agree with the Court's ultimate disposition to reverse the judgment of the court of appeals with respect to Appellant's conviction for Assault/Family Violence, and to remand the cause to that court for further consideration of Appellant's remaining points of error as they relate to that conviction.

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