NO. 14-24-00406-CR

IN THE COURT OF APPEALS FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

NO. 1782049

IN THE 228th DISTRICT COURT OF

HARRIS COUNTY, TEXAS

HAROLD LOWDINS, *Appellant*

VS.

THE STATE OF TEXAS, *Appellee*

BRIEF FOR APPELLANT

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ATTORNEY FOR APPELLANT

NAMES OF PARTIES

Appellant

Mr. Harold Lowdins

Appellant's attorney at trial

Mr. Thomas B. DuPont II, Mr. Gianpaulo Macerola

Appellant's attorney on appeal

Joseph W. Varela

Appellee

State of Texas

State's attorney at trial

Hon. Kim Ogg, District Attorney, Mr. Steven Harris, Ms. Savana Hooper, Assistants

Complainant

S. H.

Trial Court

Hon. James Anderson[1]

[1] Sitting by assignment. Hon, Stacy Allen Barrow presided over voir dire.

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TO THE HONORABLE COURT OF APPEALS:

HAROLD LOWDINS, defendant in the court below, hereinafter referred to as "Appellant," submits this Brief pursuant to Rule 38.1, Texas Rules of Appellate Procedure.

STATEMENT OF THE CASE

Appellant was indicted for the felony of aggravated sexual assault (CR I 64. Appellant entered a plea of not guilty in the 228th District Court of Harris County, Texas, Hon. James Anderson, J., presiding. Trial was to a jury, which found Appellant guilty (CR I 178). Punishment was assessed by the court at 50 years confinement in the Texas Department of Criminal Justice, pursuant to agreement of the parties, and Judgment was entered in (CR I 181). The Appellant filed a timely written notice of appeal (CR I 192). The trial court certified that Appellant had the right to appeal (CR II 37). There was no motion for new trial.

STATEMENT REGARDING ORAL ARGUMENT

Appellant hereby requests oral argument, pursuant to Rules 38.1 and 39.1 of the Texas Rules of Appellate procedure, only in the event that the State requests oral argument.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE CONVICTION ON THE ELEMENT OF THE DEADLY WEAPON

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION FOR DIRECTED VERDICT

POINT OF ERROR NUMBER THREE

THE TRIAL COURT COMMITTED EGREGIOUS ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON THE DEFINITION OF A DEADLY WEAPON

POINT OF ERROR NUMBER FOUR

THE TRIAL COURT COMMITTED EGREGIOUS ERROR IN INSTRUCTING THE JURY IN SUCH A MANNER THAT

CONSTITUTED A COMMENT ON THE EVIDENCE

POINT OF ERROR NUMBER FIVE

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

STATEMENT OF FACTS

On December 17 of 2021, Deputy Constable Donald McCullough was patrolling downtown Houston near the baseball park. He was flagged down by the Complainant, who appeared "emotionally distraught." Complainant made a report to Deputy McCullough and McCullough called for an EMS ambulance for her. EMS transported the Complainant to Ben Taub Hospital. Deputy McCullough observed Complainant to have a bruise on her head. (RR III 14-22).

Stephanie De Jongh was a forensic nurse examiner at Harris Health System. (RR III 31). She examined the Complainant. (RR III 36). She noted bruising on the Complainant's arms, breasts and chest. There was also an injury to the complainant's knee. (RR III 40-42). De Jongh then recounted what the Complainant had told her indicating that an assailant had caused her to hit her head on a pillar. The assailant made her wash with

a bucket of water. Complainant told De Johgh that he made her "suck his dick" and "fucked her," i.e. penis to vagina contact. She identified the assailant as "Harold" who lived under a certain bridge. (RR III 48-50). De Jongh did an examination of the Complainant and collected physical evidence (RR III 55-59). She described injuries she observed on the Complainant (RR III 61-64).

HPD Detective Joe Roscoe met with the Complainant and administered a photo array. (RR III 102-104).

In March of 2022 Sgt. Holbrook of HPD Homicide got a CODIS hit on Appellant which led him to the Complainant's case. He followed up by locating the Complainant and interviewing her. He obtained an arrest warrant for Appellant. (RR III 129-134). When Appellant was booked into the jail, he interviewed Appellant. A recording of that interview was admitted as State Exhibit 27 and played for the jury (RR III 134-140).

Dustin Foley of the Harris County Institute of Forensic Sciences was a DNA analyst. (RR III 173-175). He testified that he compared a known sample from Appellant against a sexual assault kit of Complainant, and the statistical analysis resulting. (RR III 181-191).

The Complainant testified that she went to a store near Minute Maid

baseball field. On her way back, her journey was interrupted by Appellant, who wanted her to walk with him down a trail. They stayed there for some time, but when she got up to leave, Appellant brandished a knife. There was a physical fight, which resulted in Complainant hitting her head on a pillar. There was no one else nearby, and Appellant asked Complainant to perform sex acts. He required her to wash herself in a bucket of water, after which he made her perform oral and vaginal sex on him. (RR IV 10-22). Afterwards, Appellant left and returned with crack cocaine, which the two of them smoked. The next morning Complainant left the scene and went to the Beacon (a nearby institution for relief of the homeless) and approached a constable. (RR IV 23-27).

Sgt. Portillo of HPD effected the arrest of Appellant, in a homeless camp. A search of Appellant's person yielded a "small pocket knife." (RR IV 60-66). The knife was admitted as State Exhibit 36 (RR IV 69).

SUMMARY OF THE ARGUMENT

Appellant first argues that the evidence is legally insufficient to sustain the conviction, because there was no evidence that would permit a rational fact-finder to conclude beyond a reasonable doubt that the knife was a deadly weapon. Appellant also argues the trial court erred when it overruled the Appellant's motion for directed verdict on the same issue.

Appellant further argues that the jury charge was defective in failing to include any definition of a "deadly weapon," and further that such constituted an impermissible comment on the evidence.

Finally, Appellant argues that trial counsel was ineffective for failure to object to the defen

POINT OF ERROR NUMBER ONE

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE CONVICTION ON THE ELEMENT THE DEADLY WEAPON.

Argument and Authorities

I. Standards for Review

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560 (1979) announced the standard for review for legal sufficiency: whether, after

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In **Brooks v. State**, 323 S.W.3d 893 (Tex. Crim. App. 2010) the Court of Criminal Appeals held that the **Jackson v. Virginia** standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.

The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. **Barnes v. State**, 876 S.W.2d 316, 321 (Tex. Crim. App. 1994); **Williams v. State**, 692 S.W.2d 671, 676 (Tex. Crim. App. 1984). The jury is entitled to draw reasonable inferences from the evidence, **Benavides v. State**, 763 S.W.2d 587 (Tex. App.-Corpus Christi 1988, pet. ref'd), and reconciliation of conflicts in the evidence is within the exclusive province of the jury, **Losada v. State**, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986).

Sufficiency of the evidence is measured by the hypothetically correct jury charge. **Malik v. State**, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)

The “rational trier of fact" standard has been adopted in Texas, **Geesa v.**

State, 820 S.W.2d 154 (Tex. Crim. App. 1991). A Texas appellate court will apply the **Jackson v. Virginia** standard by considering only the evidence that supports the verdict, and by disregarding any evidence that does not support the verdict, **Chambers v. State,** 805 S.W.2d 459 (Tex. Crim. App. 1991).

This standard applies whether the evidence is direct or circumstantial, **King v. State,** 895 S.W.2d 701 (Tex. Crim. App. 1993).

If the evidence is legally insufficient, the appellate court must order an acquittal, **Tibbs v. Florida**, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), but an appellate court may render judgment of conviction for a lesser-included offense where there is proof beyond reasonable doubt of all elements of lesser-included offense, **Britain v. State** , 412 S.W.3d 518, 521 (Tex. Crim. App. 2013).

II. The Proof Required

Tex. Penal Code § 22.011 (b) (2) provides, in relevant part, that

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

* * *

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat;

Tex. Penal Code § 22.021 (a) (2) (A) (iv) provides, essentially, that a person who commits sexual assault and "uses or exhibits a deadly weapon in the course of the same criminal episode" is guilty of aggravated sexual assault.

The Indictment pled that

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, HAROLD LOWDINS, hereafter styled the Defendant, heretofore on or about December 17, 2021, did then and there unlawfully, intentionally and knowingly cause the sexual organ of S.H., hereinafter called the Complainant, to contact the sexual organ of Harold Lowdin, without the consent of the Complainant, namely the Defendant compelled the Complainant to submit and participate by threatening to use force and violence against the Complainant, and the Complainant believed that the Defendant had the present ability to execute the threat, and in the course of the same criminal episode, the Defendant used and exhibited a deadly weapon, namely a knife.

(CR I 64).

Sexual assault is a lesser included offense of aggravated sexual assault, **Ghoulson v. State**, 5 S.W.3d 266, 274 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) and the only distinction between the two charges in the case at bar is the aggravating element that the Appellant used or displayed a deadly weapon, **Hampton v. State**, 66 S.W.3d 430, 432 (Tex. App. –

Houston [1st Dist.] 2001), *rev'd other grounds*, **Hampton v. State**, 109 S.W.3d 437 (Tex. Crim. App. 2003). Therefore, before Appellant may be convicted of aggravated sexual assault, there must be proof that he committed sexual assault, and there also must be proof of the additional element of use or exhibition of a deadly weapon.

III The Evidence is Legally Insufficient

No witness testified that the knife Appellant allegedly possessed during the commission of the sexual assault was a deadly weapon.

When Sgt. Portillo later searched the Appellant incident to arrest, he found what he described as a "small pocket knife." (RR IV 60-66). The knife was admitted as State Exhibit 36 (RR IV 69). The Complainant recognized State Exhibit 34, a photo of a knife, as the one Appellant possessed (RR IV 17). The Complainant "believed" that Appellant was capable of inflicting death with that knife (RR IV 18) but expressed no basis for that belief. On cross, she expressed that she was in fear for her life, although it "could have been a little bitty knife." (RR IV 50).

There was no evidence that the knife in the instant case was an instrument that "in the manner of its use or intended use is capable of causing

death or serious bodily injury," Tex. Pen. Code § 1.07 (a) (17) (B). Knives are not necessarily deadly weapons under subsection (A) of Texas Penal Code section 1.07(a)(17). "A knife is not a deadly weapon per se, but the State may 'prove a particular knife to be a deadly weapon by showing its size, shape, and sharpness, the manner of its use or intended use, and its capacity to produce death or serious bodily injury.'" **Clark v. State**, 444 S.W.3d 671, 678 (Tex. App.-Houston [14th Dist.] 2014, pet. ref'd) (quoting **Blain v. State**, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983)). See also **Lafleur v. State**, 106 S.W.3d 91, 95 (Tex. Crim. App. 2003); **Thomas v. State**, 821 S.W.2d 616, 619-20 (Tex.Crim.App.1991) (en banc). Factors to consider in determining whether the knife qualified as a deadly weapon under subsection (B) include (1) the size, shape, and sharpness of the knife; (2) the manner in which appellant used the weapon; (3) the nature of any inflicted wounds; (4) testimony concerning the knife's life-threatening capabilities; and (5) the words appellant spoke. See **Thomas**, 821 S.W.2d at 619; **Tisdale v. State**, 686 S.W.2d 110, 111 (Tex. Crim. App. 1984) (en banc).

In the case at bar, the knife was described as a "small pocket knife." A pocket knife is not a deadly weapon per se and is not ordinary calculated to produce death. **Limuel v. State**, 568 S.W.2d 309, 311-12 (Tex. Crim. App.

1978). The complainant testified that she was subjectively afraid, but never articulated how Appellant used the knife in a manner consistent with intending to use it as a deadly weapon. According to the Complainant, Appellant had the knife "right beside him," but she equated that with having the knife "on her." (RR IV 20). Complainant agreed with the prosecutor that the knife was a "deadly weapon," but offered no basis for that opinion.

There were no wounds inflicted. There was no testimony about whether the knife had life-threatening capabilities. Appellant made no specific threats to use the knife on Complainant. Complainant expressed subjective fears in several instances (e.g. RR IV 27) but never articulated any specific threats.

The State therefore failed to prove beyond a reasonable doubt that a deadly weapon was used or exhibited.

This Court should reverse this case and order an acquittal, **Tibbs v. Florida,** supra, as to an offense of aggravated sexual assault under 21.02, and reform the judgment to reflect a conviction for a lesser included offense of sexual assault, **Thornton v. State**, 425 S.W.3d 289 (Tex. Crim. App. 2014).

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION FOR DIRECTED VERDICT

Argument and Authorities

I. Standards for Review

The law is well settled that a challenge to the denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence. **Gabriel v. State**, 290 S.W.3d 426, 435 (Tex. App.—Houston [14th Dist.] 2009, no pet.); **Lewis v. State**, 193 S.W.3d 137 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

II. The Motion for Directed Verdict

At the close of the State's evidence, defense counsel moved for a directed verdict. This motion was overruled (RR V 102).

III. The Motion should have been Granted

Reference is made to Point of Error No. 1, which is incorporated herein.

There was no evidence that would convince a rational fact finder that Appellant used or exhibited a deadly weapon. The evidence was legally insufficient and the Motion for Directed Verdict was proper. It was error to overrule it.

This Court should reverse and order acquittal on the conviction for aggravated sexual assault, **Tibbs**, supra, as prayed for in Point of Error No. 1.

POINT OF ERROR NUMBER THREE

THE TRIAL COURT COMMITTED EGREGIOUS ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON THE DEFINITION OF A DEADLY WEAPON

I. Standards for Review

The trial judge has the legal duty and responsibility to prepare for the jury a proper charge distinctly setting forth the law applicable to the case, Tex. Code Crim. Pro. art. 36.14. Appellate courts review the alleged charge error by answering two questions: (1) whether error actually existed in the charge, **Ngo v. State**, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); and (2) whether sufficient harm resulted from the error to result in reversal. See

Posey v. State, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998).

If the error was subject to a timely objection at trial, "then reversal is required if the error is 'calculated to injure the rights of the defendant' which means that there must be no more than that there must be some harm to the accused from the error." **Almanza v. State**, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Essentially, this means that under the "some harm" analysis, "an error which has been properly preserved by objection will call for reversal as long as the error is not harmless." Id. In **Arline v. State**, 721 S.W.2d 348 (Tex. Crim. App. 1986) the Court further refined the "some harm" analysis enunciated in **Almanza** by requiring that the defendant must have suffered "'some' actual, rather than theoretical harm from the error." But the Court noted that "the presence of any harm, regardless of degree . . . is sufficient to require a reversal of the conviction. Cases involving preserved charging error will be affirmed only if no harm has occurred." **Arline**, 721 S.W.2d at 351.

If there was no objection to the charge complained of, a defendant may obtain a reversal only in those few situations where the error is "fundamental" or is "egregious[ly] harmful." See **Almanza**, 686 S.W.2d at 171-72 (op. on reh'g) (a " fundamental error must ‘go to the very basis of the case’ ")

There is no "burden of proof" on either an appellant or the State in an **Almanza** harm analysis, **Warner v. State**, 245 S.W.3d 458 (Tex. Crim. App. 2008).

In conducting the harm analysis, a reviewing court may consider the following factors: (1) the charge itself; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. **Benge v. State**, 94 S.W.3d 31, 37 (Tex. App.-Houston [14th Dist.] 2002, pet. ref'd).

II. The Indictment, the Jury Instructions, and the Verdict

The indictment alleged aggravated sexual assault, via use or display of a deadly weapon, namely, a knife (CR I 64). The application paragraph of the jury charge read

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 17th day of December, 2021, in Harris County, Texas, the defendant, Harold Lowdins, did then and there unlawfully, intentionally or knowingly cause the sexual organ of S.H. to contact the sexual organ of Harold Lowdins, without, the consent of S.H., namely the defendant compelled S.H. to submit or participate by threatening to use force or violence against S.H., and S.H. believed that the defendant had the present ability to execute the threat, and in the course of the same criminal episode, the defendant used or exhibited a deadly weapon, namely, a knife, then you will find the defendant guilty of aggravated sexual assault,

as charged in the indictment.

(CR I 173). There was no objection to the charge. The jury found Appellant "guilty of aggravated sexual assault as charged in the indictment." (CR – 178).

III. The Jury Charge was Error

The trial court committed error when it failed to instruct the jury on the statutory definition of deadly weapon. The Texas Penal Code defines a deadly weapon as "Anything that in the manner of its use or intended use is capable of causing death or serious bodily injury," Tex. Pen. Code § 1.07 (a) (17) (B).

As law applicable to the case, "the definitions of words or phrases defined by statute must be included in the jury charge." **Arteaga v. State**, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017); **Villarreal v. State**, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009) (noting that the jury must be instructed regarding statutory definitions affecting the meaning of an element of the offense).

The only mention in the jury charge in the case at bar of a deadly weapon was in the application paragraph. Since a knife is not a deadly weapon per se, **Hawkins v. State**, 605 S.W.2d 586 (Tex. Crim. App. 1980), Appellant was entitled to have the jury consider whether or not the knife allegedly used or displayed by Appellant was a deadly weapon. The jury charge as given assumed that the knife was a deadly weapon. This erroneous charge had the same effect as that condemned in **Blanson v. State**, 107 S.W.3d 103 (Tex. App.-Texarkana 2003 no pet.). In **Blanson**, the trial court instructed the jury that "a knife is a deadly weapon." Even though there was no objection, the **Blanson** court found egregious harm under **Almanza** and reversed. In contrast to **Blanson**, the language in Appellant's charge did not contain a positive definition that a knife is a deadly weapon; but the effect of the charge failing to define a deadly weapon forced the jury to assume that if they found that a knife was used or exhibited, it was per se a deadly weapon.

The presumption of innocence follows the defendant throughout the trial of every criminal case. **Will v. State**, 794 S.W.2d 948 (Tex. App. – Houston [1st Dist.] 1990, pet. ref'd.), citing **Massey v. State**, 154 Tex. Crim. 263, 226 S.W.2d 856, 860 (Tex. Crim. App. 1950). In the case at bar, the

instructions in essence foreclosed the jury from finding that even though a knife was used or exhibited, the state had not proven beyond a reasonable doubt that it was a deadly weapon. A proper instruction would have required the jury to consider this element under the reasonable-doubt standard. By foreclosing this issue, the trial court violated Appellant's presumption of innocence on the element of the deadly weapon.

IV. Harm.

Errors that result in "egregious harm" are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive. **Taylor v. State**, 332 S.W.3d 483, 490 (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. **Reeves v. State**, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). An egregious harm determination must be based on a finding of actual rather than theoretical harm. **Arrington v. State**, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). The egregious harm inquiry is fact specific and must be performed on a case-by-case basis. **Gelinas v. State**, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013). In making an

egregious harm determination, an appellate court considers: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the trial record as a whole. See **Villarreal v. State**, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); **Almanza v. State**, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

A. The entire charge.

Harm was "egregious" under **Almanza**, if for no other reason than the erroneous charge itself. Error can be of such magnitude that the *charge itself* will satisfy the **Almanza** egregious-harm standard, without the need for any additional factors, see **Farrakhan v. State**, 263 S.W.3d 124, 145 (Tex. App.--Houston [1st Dist.] 2006), aff'd, 247 S.W.3d 720 (Tex. Crim. App. 2008). Juries are presumed to follow the court's charges, **Lopez v. State**, 779 S.W.2d 411 (Tex. Crim. App. 1989).

In this charge, there was no definition whatsoever of "deadly weapon," although that is a statutorily-defined term and is law applicable to the case, **Arteaga**, supra. Whether or not a deadly weapon was used determined whether aggravated sexual assault had occurred; had the jury found the knife not to be a deadly weapon, they would have been bound to acquit the

Appellant of aggravated sexual assault.[2]

B. The state of the evidence.

Reference is made to Point of Error No. 1. In this case, there was no evidence that the knife was a deadly weapon as defined by statute. There was testimony about it being a "small pocket knife," (RR IV 60-66), and that it "could have been a little bitty knife." (RR IV 50). There were several instances of Complainant's general fear, but no testimony about the capabilities of the knife. The charge as given either required the jury to find that the knife was indeed a deadly weapon, or invited them to speculate, without statutory guidance, on whether or not it was a deadly weapon.

C. Arguments of counsel.

The State mentioned "the knife that the Defendant had in his hands," (RR IV 141) but did not discuss the knife under the constraints of the statutory definition. In other words, (and not that the State had the duty to do so), the State's argument was also free of any constraining definition.

D. Other relevant information in the record.

Someone on the jury made notes on the jury charge. There were references to "beyond a reasonable doubt," notes about consent, credibility,

[2] Since there was no submission of a lesser included offense, such as sexual assault, the

and other relevant issues (CR I 172 et seq.). This indicated that the jury was considering issues raised by the evidence and the court's charge. Nowhere in any of those notes is there a mention of deadly weapon, despite the paucity of the evidence on that issue as described above. This might indicate that the jury considered the issue of the deadly weapon foreclosed by the trial court's erroneous instruction.

Appellant was egregiously harmed by the court's erroneous instruction, **Almanza**, supra.

This Court should reverse for a new trial.

POINT OF ERROR NUMBER FOUR

THE TRIAL COURT COMMITTED EGREGIOUS ERROR IN INSTRUCTING THE JURY IN SUCH A MANNER THAT CONSTITUTED A COMMENT ON THE EVIDENCE

Argument and Authorities

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choices would have been either guilty of aggravated sexual assault, or an acquittal.

I. Standards for Review

Reference is made to Point of Error Number Three above.

The trial judge has the legal duty and responsibility to prepare for the jury a proper charge distinctly setting forth the law applicable to the case, Tex. Code Crim. Pro. art. 36.14. Appellate courts review the alleged charge error by answering two questions: (1) whether error actually existed in the charge, **Ngo v. State**, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); and (2) whether sufficient harm resulted from the error to result in reversal. See **Posey v. State**, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998).

If the error was subject to a timely objection at trial, "then reversal is required if the error is 'calculated to injure the rights of the defendant' which means that there must be no more than that there must be some harm to the accused from the error." **Almanza v. State**, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Essentially, this means that under the "some harm" analysis, "an error which has been properly preserved by objection will call for reversal as long as the error is not harmless." Id. In **Arline v. State**, 721 S.W.2d 348 (Tex. Crim. App. 1986) the Court further refined the "some harm" analysis

enunciated in **Almanza** by requiring that the defendant must have suffered "'some' actual, rather than theoretical harm from the error." But the Court noted that "the presence of any harm, regardless of degree . . . is sufficient to require a reversal of the conviction. Cases involving preserved charging error will be affirmed only if no harm has occurred." **Arline**, 721 S.W.2d at 351.

But if there was no objection to the charge complained of, a defendant may obtain a reversal only in those few situations where the error is "fundamental" or is "egregious[ly] harmful." See **Almanza**, 686 S.W.2d at 171-72 (op. on reh'g) (a " fundamental error must 'go to the very basis of the case' ").

There is no "burden of proof" on either an appellant or the State in an **Almanza** harm analysis, **Warner v. State**, 245 S.W.3d 458 (Tex. Crim. App. 2008).

In conducting the harm analysis, a reviewing court may consider the following factors: (1) the charge itself; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. **Benge v. State**, 94 S.W.3d 31, 37 (Tex. App.-Houston [14th Dist.] 2002, pet. ref'd).

A trial court may not submit a charge that comments on the weight of the evidence. See Tex. Code Crim. Pro. art. 36.14. A charge comments on the weight of the evidence if it assumes the truth of a controverted issue or directs undue attention to particular evidence. See **Whaley v. State**, 717 S.W.2d 26, 32 (Tex. Crim. App. 1986); **Hawkins v. State**, 656 S.W.2d 70, 73 (Tex. Crim. App. 1983); **Lacaze v. State**, 346 S.W.3d 113, 118 (Tex. App—Houston [14th Dist.] 2011, pet. ref'd). In determining whether the charge improperly comments on the weight of the evidence, courts should consider the court's charge as a whole and the evidence presented at trial. See **Russell v. State**, 749 S.W.2d 77, 79 (Tex. Crim. App. 1988).

II. The Indictment, the Jury Instructions, and the Verdict

The indictment alleged aggravated sexual assault, via use or display of a deadly weapon, namely, a knife (CR I 64). The application paragraph of the jury charge read

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 17th day of December, 2021, in Harris County, Texas, the defendant, Harold Lowdins, did then and there unlawfully, intentionally or knowingly cause the sexual organ of S.H. to contact the sexual organ of Harold Lowdins, without, the consent of S.H., namely the defendant compelled S.H. to submit or

participate by threatening to use force or violence against S.H., and S.H. believed that the defendant had the present ability to execute the threat, and in the course of the same criminal episode, the defendant used or exhibited a deadly weapon, namely, a knife, then you will find the defendant guilty of aggravated sexual assault, as charged in the indictment.

(CR I 173). There was no objection to the charge. The jury found Appellant "guilty of aggravated sexual assault as charged in the indictment." (CR – 178).

III. The Jury Charge was Error

The language complained of above was an impermissible comment on the evidence. By failing to define deadly weapon, the only language available to the jury was in the application paragraph. This charge deprived the Appellant of the right to have the jury decide whether the State had met it burden of proof beyond a reasonable doubt on the issue of the deadly weapon. The trial court, in effect, required the jury to find that a knife was a deadly weapon. The charge assumed the truth of a controverted issue, **Whaley**, supra. This is particularly true in the case at bar, where there was no testimony concerning the capabilities of the knife to inflict death or serious bodily injury (see Point of Error Number Three).

IV. Harm.

Errors that result in "egregious harm" are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive. **Taylor v. State**, 332 S.W.3d 483, 490 (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. **Reeves v. State**, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). An egregious harm determination must be based on a finding of actual rather than theoretical harm. **Arrington v. State**, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). The egregious harm inquiry is fact specific and must be performed on a case-by-case basis. **Gelinas v. State**, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013). In making an egregious harm determination, an appellate court considers: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the trial record as a whole. See **Villarreal v. State**, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); **Almanza v. State**, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

A. The entire charge.

Harm was "egregious" under **Almanza**, if for no other reason than the erroneous charge itself. Error can be of such magnitude that the *charge itself* will satisfy the **Almanza** egregious-harm standard, without the need for any additional factors, see **Farrakhan v. State**, 263 S.W.3d 124, 145 (Tex. App.--Houston [1st Dist.] 2006), aff'd, 247 S.W.3d 720 (Tex. Crim. App. 2008). Juries are presumed to follow the court's charges, **Lopez v. State**, 779 S.W.2d 411 (Tex. Crim. App. 1989).

In this charge, there was no definition whatsoever of "deadly weapon," although that is a statutorily-defined term. Whether or not a deadly weapon was used determined whether aggravated sexual assault had occurred; had the jury found the knife not to be a deadly weapon, they would have been bound to acquit the Appellant of aggravated sexual assault.[3] But the trial court's instruction in the application paragraph essentially communicated to the jury that there was no issue as to whether the State had to prove, or had proved, the knife was a "deadly weapon" under the statutory definition, as none was given.

B. The state of the evidence.

Reference is made to Point of Error No. 1. In this case, there was no evidence that the knife was a deadly weapon as defined by statute. There was testimony about it being a "small pocket knife," (RR IV 60-66), and that it "could have been a little bitty knife." (RR IV 50). There were several instances of Complainant's general fear, but no testimony about the capabilities of the knife. The charge as given either required the jury to find that the knife was indeed a deadly weapon, or invited them to speculate, without statutory guidance, on whether or not it was a deadly weapon. If the jury believed they could speculate, they were guided improperly by the trial court's application paragraph, which gave the jury no opportunity to find that the State had failed to prove that the knife was a deadly weapon.

C. Arguments of counsel.

The State mentioned "the knife that the Defendant had in his hands," (RR IV 141) but did not discuss the knife under the constraints of the statutory definition. Indeed the State never argued that they had proven that the knife was a deadly weapon. In other words, it is not idle to suggest that since the State didn't argue that they had proven that the knife was a deadly weapon, the jury might further assume that the State didn't have to; the trial

[3] Since there was no submission of a lesser included offense, such as sexual assault, the

court had already found so.

D. Other relevant information in the record.

Someone on the jury made notes on the jury charge. There were references to "beyond a reasonable doubt," notes about consent, credibility, and other relevant issues (CR I 172 et seq.). This indicated that the jury was considering issues raised by the evidence and the court's charge. Nowhere in any of those notes is there a mention of deadly weapon, despite the paucity of the evidence on that issue as described above. This might indicate that the jury considered the matter foreclosed by the trial court's erroneous instruction.

Appellant was egregiously harmed by the court's erroneous instruction, **Almanza**, supra.

POINT OF ERROR NUMBER FIVE

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

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choices would have been either guilty of aggravated sexual assault, or an acquittal.

ARGUMENT AND AUTHORITIES

I. Standards for Review

The United States Supreme Court has established a standard for constitutional review of performance of criminal defense counsel. In **Strickland v. Washington**, 104 S.Ct. 2052 (1984) the Court held that a defendant must make an initial showing of professional error:

> When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . . A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . The court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. 104 S.Ct. at 2064-2066.

The Court also held that once a defendant makes this initial showing of counsel's error, he must also show prejudice resulting from the error complained of:

> . . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 104 S.Ct. at 2068.

The Texas Court of Criminal Appeals adopted the **Strickland v. Washington** standard to determine if counsel was effective in **Hernandez v. State**, 726 S.W.2d 53 (Tex. Crim. App. 1986)(en banc), for purposes of Tex. Const. Ann. art. I § 10 and Tex.Code Crim.Pro. Ann. art. 1.05. **Hernandez** held that Texas law did not set a higher standard than did the Supreme Court for Sixth Amendment purposes in **Strickland**, and that the federal standards were to be followed fully in analyzing ineffective assistance claims in Texas proceedings. The **Strickland** test is applicable to ineffective assistance claims at the guilt-innocence stage of both capital and non-capital trials. **Craig v. State**, 825 S.W.2d 128, 129 (Tex.Crim.App. 1992). **Strickland** also applies to the punishment phase of a noncapital case, **Hernandez v. State**, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. **Cannon v. State**, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

In essence, there is a two-step analysis. First, the court must determine whether counsel's performance fell below the objective standard of reasonableness under prevailing professional norms; if so, the court must determine if there is prejudice, i.e., whether the conviction "resulted from a breakdown in the adversarial process that renders the result unreliable," **Strickland**, 104 S.Ct. at 1064; **Boyd v. State**, 811 S.W.2d 105 (Tex. Crim. App. 1991).

II. Counsel's Performance was Deficient

In the case at bar, concerning the first prong of **Strickland**, defense counsel committed a professional error when they failed to object to the jury charge for failure to include the statutory definition of "deadly weapon."

Appellant was indicted for aggravated sexual assault, the aggravating element being an allegation of the use or exhibition of a deadly weapon, namely, a knife. (CR I 64). Although the Penal Code contains a definition of deadly weapon, viz, "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury," Tex. Pen. Code § 1.07 (a) (17) (B), the trial court's proposed charge did not contain this definition. (CR I 172). The defense made no objection to this charge, and no request for the

definition to be included in the charge.

Had the defense properly objected, the trial court would have been required to include the definition; as law applicable to the case, "the definitions of words or phrases defined by statute must be included in the jury charge." **Arteaga v. State**, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017); **Villarreal v. State**, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009) (noting that the jury must be instructed regarding statutory definitions affecting the meaning of an element of the offense). It is also worth noting that the application paragraph of the jury charge did not incorporate the statutory definition, or indeed any definition, of deadly weapon.

As a general rule, ineffective assistance claims should not be heard on direct appeal, because the trial counsel has no opportunity to reveal his trial strategy and the courts will not speculate, **Jackson v. State**, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); **Delrio v. State**, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992). There is a strong presumption that defense counsel's conduct was reasonable and constituted sound trial strategy, **Strickland**, 466 U.S. at 689, 104 S.Ct. at 2065. But it is apparent from the record in the case at bar that there could be no conceivable trial strategy for Appellant's counsel's omissions. There is no scenario imaginable where choosing not to request a

statutory definition of a deadly weapon could benefit Appellant.

III. Appellant suffered prejudice

The "prejudice" prong of **Strickland** requires this Court to determine if trial counsel's deficient conduct was sufficient to undermine its confidence in the outcome, that is, whether there is a reasonable probability that, but for this deficient conduct, the result of the trial would have been different. **Strickland v. Washington**, 466 U.S. at 694; **Kyles v. Whitley**, 514 U.S. 419, 430 (1995).

In Appellant's case, there was little if any testimony concerning the design, dimensions, and capabilities of the knife (see points of error above). Incorporating the arguments made in Points of Error Three and Four, there are two possibilities. First, that the court's charge as given commented impermissibly on the evidence. Second, that the jury, unbound by any statutory definition, was free to speculate on the character of the knife as a deadly weapon. Either way, Appellant was tried under a defective jury charge which permitted the jury to convict him without considering whether

the State had proven the knife was a deadly weapon beyond a reasonable doubt.

Confidence in the outcome of Appellant's trial has been undermined. This Court should reverse and remand for a new trial.

CONCLUSION AND PRAYER

For the reasons stated above, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief contains 6,844 words.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Appellate Division, District Attorney's Office, by efile service, on the date of filing.

/s/Joseph W. Varela
Joseph W. Varela

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