the Jasuta / Schulman report

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TIBA's Case of the Week

Seventh Court of Appeals (Amarillo)

Case Name: ***Jocelin Perez Jaimes v. The State of Texas***

- **OFFENSE**: Indecency with a Child
- **COUNTY**: Potter
- **C/A CASE No**. 07-23-00383-CR and 07-23-00384-CR
- **DATE OF OPINION**: December 31, 2024 **OPINION**: Justice Alex Yarbrough
- **DISPOSITION**: Convictions Reversed
- **TRIAL COURT**: 108th D/C; Hon. Douglas Woodburn
- **LAWYERS**: John Bennett (Defense); Jack Owen (State)

(**Background Facts**): Appellant has DACA (Deferred Action for Childhood Arrivals) status. She participated in special education classes and graduated from high school in 2014. A counselor testified that Appellant's primary language is Spanish and although she communicates in English "most of the time," she is not proficient in the language. The counselor added Appellant had the maturity level of a sixteen or seventeen-year-old. Between 2016 and 2021, Appellant lived with the complainant and her older sister who was Appellant's romantic partner. When the complainant was approximately twelve years old, she and Appellant began engaging in playful wrestling which included tickling and pinching. The conduct continued for several years and as the complainant matured, she became uncomfortable. In April 2019, the complainant's sister was arrested for domestic violence committed against Appellant. Trial was scheduled for September 30, 2021. In May 2021, Appellant and the complainant's sister ended their relationship. Just weeks before the domestic violence trial was scheduled, the complainant, then seventeen-years-old, made an outcry that Appellant had fondled her on several occasions while wrestling. Appellant was charged with two counts of indecency with a child.

[§§ **321.04 Court's Charge / Application Paragraph**]: The jury charge included the full statutory definitions of "intentionally" and "knowingly" in the abstract portion without tailoring them to the offense of indecency with a child, a "nature-of-conduct" offense. Appellant maintains the court's charge in each case erroneously permitted conviction based on the result or circumstances surrounding the alleged conduct rather than the nature of the alleged conduct and that the error was harmful.

Holding: The State acknowledges that inclusion of both the result-of-conduct and nature-of conduct paragraphs was error. A concession of error by the State is not conclusive on appeal. ***Saldano v. State***, 70 S.W.3d 873 (Tex.Cr.App. 2002)(see G&S, Vol. 10, No. 11; 03/18/2002). *** We have independently reviewed the charge and agree it is erroneous. ***Cook v. State***, 884 S.W.2d 485 (Tex.Cr.App. 1994)(holding a trial court errs by failing to limit the definitions of culpable mental states to the conduct element or elements of the offense to which they apply).

Holding (**Harm Analysis**): Defense counsel's objection preserved Appellant's jury charge issue and because of the objection, our analysis is limited to whether Appellant suffered "some" harm, i.e., error that is calculated to injure the rights of the defendant. ***Barrios v. State***, 283 S.W.3d 348, 350 (Tex.Cr.App. 2009)(see G&S, Vol. 17, No. 17; 05/04/2009), overruled in part, ***Sandoval v. State***, 665 S.W.3d 496 (Tex.Cr.App. 2022)(see G&S, Vol. 30, No. 46; 12/12/2022). "Some" harm means actual as opposed to theoretical harm. ***Campbell v. State***, 664 S.W.3d 240 (Tex.Cr.App. 2022)(see G&S, Vol. 30, No. 35; 09/26/2022), citing ***Cornet v. State***, 417 S.W.3d 446 (Tex.Cr.App. 2013)(see G&S, Vol. 21, No. 45; 11/11/2013). In ***Arline v. State***, 721 S.W.2d 348 (Tex.Cr.App. 1986), the Court acknowledged that the term "some" was left undefined in ***Almanza v. State***, 686 S.W.2d 157 (Tex.Cr.App. 1985) and expressly found that in the context of jury-charge-error analysis under ***Almanza***, the presence of **any** harm, regardless of degree, which results from preserved charge error, is sufficient to require reversal of a conviction (emphasis in original). See ***Chambers v. State***, 580 S.W.3d 149 (Tex.Cr.App. 2019)(see G&S, Vol. 27, No. 24; 07/01/2019)(holding same). "Cases involving preserved charging error will be affirmed only if no harm has occurred." ***Abdnor v. State***, 871 S.W.2d 726 (Tex.Cr.App. 1994). *** The application paragraphs instructed the jury that indecency with a child required "intentionally or knowingly" committing the offense but omitted any reference to the nature of conduct, result of conduct, or circumstances surrounding the conduct, which were included in the abstract portion of each charge. Inconsistent instructions could have easily confused or mislead the jury thereby compounding the error. The erroneous instruction left open the possibility the jury could have relied on an inapplicable culpable mental state to convict Appellant. *** The prosecutor "sold" the jury a result-of-conduct argument rather than a nature-of-conduct argument. The jury was erroneously charged and permitted to return a conviction on inapplicable culpable mental states. Such an error cannot be characterized as harmless when all that is required is any harm. *** The erroneous jury charge and the trial court's denial of the requested instruction on the correct culpable mental states hampered the jury's ability to properly evaluate the evidence against Appellant. Consideration of the ***Almanza*** factors demonstrates Appellant suffered the requisite harm required -- any harm -- for reversal of her convictions.

Sidebars

(**David A. Schulman**) I'm certain the Court's Charge was complicated, yet trial counsel timely and properly objected. Additionally, Appellate counsel did a fine job of getting the Court of Appeals focused on how Appellant was harmed.

(**Troy McKinney**) The law on the issue of what definitions of intentional, knowing, reckless, or negligence should be in the charge has been well settled for 40-ish years, yet lawyers on both sides and judges still don't get it. In this case the prosecutor and judge blew it. There are also still many defense lawyers who also don't get it, which is why most of these cases involve no defense lawyer objection and the resulting Almanza egregious harm standard. The COA's Almanza "some harm" analysis is spot on.