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No. 04-15-00204-CR

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ROBERT RODRIGUEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Guadalupe County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

FILED IN
COURT OF CRIMINAL APPEALS

April 22, 2016

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Robert Rodriguez.

*The case was tried before the Honorable Michael McCormick, Presiding Judge of the 274th District Court in Guadalupe County, Texas.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ROBERT RODRIGUEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully urges this Court to grant discretionary review of the above named cause, pursuant to the rules of appellate procedure.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. This case requires the Court to again examine the interplay between mistake of fact and transferred intent, this time with "greater" offenses written without any additional culpable mental state. The issues are complex, and this case reveals flaws in the current state of the law. Discussion would benefit the Court.

STATEMENT OF THE CASE

Appellant was convicted of aggravated assault. The court of appeals reversed his conviction because the trial court submitted an instruction on transferred intent but refused his request for an instruction on mistake of fact.

STATEMENT OF PROCEDURAL HISTORY

Appellant's conviction was reversed in a published opinion on March 23, 2016.[1] No motion for rehearing was filed. The State's petition is due April 22, 2016.

GROUND FOR REVIEW

Does the submission of an instruction on transferred intent entitle a defendant to an instruction on mistake of fact even if the greater offense does not have any additional culpable mental state and there is no evidence that the defendant harbored a mistaken belief?

ARGUMENT AND AUTHORITIES

This Court has twice held that a defendant who is subject to a transferred-intent provision is entitled, upon request, to a mistake-of-fact instruction.[2] The court of appeals relied on this directive and held that appellant was entitled to a "mistake"

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[1] *Rodriguez v. State*, 04-15-00204-CR, __S.W.3d__, 2016 Tex. App. LEXIS 2937 (Tex. App.–San Antonio 2016).

[2] *Louis v. State*, 393 S.W.3d 246, 253 (Tex. Crim. App. 2012); *Thompson v. State*, 236 S.W.3d 787, 800 (Tex. Crim. App. 2007) ("Where [Penal Code] § 6.04(b)(1) permits the transfer of a culpable mental state, mistake of fact may be raised as a defense."). *See* TEX. PENAL CODE § 6.04(b)(1) ("A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different offense was committed[.]"); TEX. PENAL CODE § 8.02(a) ("It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.")

instruction without identifying any evidence supporting his mistake or considering whether transferred-intent even applies to the offense at issue.[3] Its errors illustrate persistent problems in this area of law.

Thompson and *Louis*

In *Thompson*, this Court affirmed its holding in *Honea v. State*[4] that the intent to commit a lesser offense transfers to the greater offense.[5] It added that this applies when the two are in a single statute.[6] But it also disagreed with *Honea*'s holding that the defendant in such a case would not be entitled to an instruction on mistake of fact.[7] This was based on the likelihood that, given the history of the two doctrines, "the Legislature intended in its enactment of the current Penal Code that these two aspects of the law go hand-in-hand."[8] It also observed that

> applying the mistake of fact defense to the transfer of intent between offenses mitigates greatly the concern that a person could be penalized far beyond his actual culpability. At the same time, it has the salutary effect of placing some onus on the person who intends to commit a lesser offense to exercise care that a greater one is not in fact committed. Our interpretation seems to be the only one that gives meaning and effect both to § 6.04(b)(1) and to § 8.02.[9]

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[3] Slip op. at 6 (quoting and relying on *Louis*).

[4] 585 S.W.2d 681 (Tex. Crim. App. 1979).

[5] *Thompson*, 236 S.W.3d at 800; *see Honea*, 585 S.W.2d at 684-85.

[6] *Thompson*, 236 S.W.3d at 800.

[7] *Id*.; *see Honea*, 585 S.W.2d at 687.

[8] *Thompson*, 236 S.W.3d at 799.

[9] *Id*. at 800.

This entitlement was not tested because Thompson did not request an instruction on mistake of fact.[10] Louis did, however, and this Court affirmed *Thompson*'s directive in his case: "We held in *Thompson* . . . that a defendant who is subject to a transferred-intent provision is entitled, upon request, to a mistake-of-fact instruction. Appellant was indeed subjected to such an instruction, thus upon his request, he was entitled to have a mistake-of-fact instruction included in the jury charge."[11]

Submission should not be reflexive.

A defensive instruction should not be submitted without evidence to support it.

Mistake-of-fact is a defense.[12] Like all defenses, the issue of its existence "is not submitted to the jury unless evidence is admitted supporting the defense."[13] "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true."[14]

In this case, the court of appeals relied exclusively on *Louis* and so did not

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[10] *Id*.

[11] *Louis*, 393 S.W.3d at 253.

[12] *Thompson*, 236 S.W.3d at 793; TEX. PENAL CODE § 8.02(a) ("It is a defense . . . .").

[13] TEX. PENAL CODE § 2.03(c); *see Granger v. State*, 3 S.W.3d 36, 41 (Tex. Crim. App. 1999) ("When an accused creates an issue of mistaken belief as to the culpable mental element of the offense, he is entitled to a defensive instruction of 'mistake of fact.'") (citation and quotations omitted).

[14] *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007).

discuss any evidentiary basis for entitlement. It did conclude in its harm analysis that "[i]t would not be unreasonable for [appellant] to be mistaken about the type of injuries his actions . . . would cause" given the "unusual" injuries suffered.[15] But the defense requires that "the actor" form a reasonable yet mistaken belief.[16] Even if a reasonable person could have been mistaken under the circumstances, there is no evidence that *appellant* formed any belief that would negate the culpability required.[17]

Submitting a mistake-of-fact instruction that is not based on evidence in order to permit a finding of guilt on a lesser offense invites the jury to reach an irrational verdict.[18] This was presumably not the Court's intent; it had no reason to address the evidence requirement in *Thompson* because no request was made, and evidence was not lacking in *Louis*. But its opinions are explicit, the court of appeals followed them, and the result is a violation of a basic rule for entitlement to defenses.

Aggravated assault does not require the intent to cause serious bodily injury.

The larger problem with application of the *Thompson*/*Louis* rule is that

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[15] Slip op. at 7.

[16] TEX. PENAL CODE § 8.02(a).

[17] As summarized in the slip op. at 2-3, appellant and his brother pulled the victim from his SUV outside a club because he would not give them a ride. They hit him before and after he fell to his knees. The victim suffered a broken nose, severely swollen eyes, and a bone fracture in his knee that required surgery and extensive physical therapy. Appellant never offered any explanation.

[18] *See Arevalo v. State*, 943 S.W.2d 887, 890 (Tex. Crim. App. 1997), *overruled on other grounds*, *Grey v. State*, 298 S.W.3d 644, 651 (Tex. Crim. App. 2009) (explaining the consequences of instructing a jury on a lesser included offense not raised by the evidence).

transferred intent was not necessary in this case. In its rush to comply with *Louis*, the court of appeals did not examine the elements of the alleged offense to determine what intent was purportedly being provided by transfer.

Appellant was convicted of aggravated assault. "A person commits [aggravated assault] if the person commits assault as defined in Section 22.01 and the person . . . causes serious bodily injury to another, including the person's spouse."[19] By drafting aggravated assault as it did, the Legislature made it clear that someone who commits an assault is responsible for the serious bodily injury he causes regardless of whether he intended it. This reflects "the general pattern of the Texas Penal Code," by which "a culpable mental state is often not required regarding an element . . . that transforms an offense into an aggravated form of that offense."[20] If there is no requirement of a greater intent, there is no need to transfer a lesser one and no culpability to be negated by mistake.[21] Therefore, there was no need to apply

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[19] TEX. PENAL CODE § 22.02(a)(1).

[20] TEXAS CRIMINAL PATTERN JURY CHARGES—CRIMES AGAINST PERSONS (State Bar of Texas 2011) § C8.14 p. 217. *See Landrian v. State*, 268 S.W.3d 532, 538 (Tex. Crim. App. 2008) (degree of the victim's injury is an "aggravating factor" when punishing "simple 'bodily injury' assault."). Lower courts have reached the same conclusion with aggravated assault by use or exhibition of a deadly weapon. *See*, *e.g.*, *Butler v. State*, 928 S.W.2d 286, 288 (Tex. App.–Fort Worth 1996, pet. ref'd) ("Under the express language of section 22.02 and prevailing case law, a second culpable mental state is not required to be included with the deadly weapon element."). In a related matter, the Court has granted review to determine whether the drug-free zone enhancements for drug offenses require a culpable mental state. PD-1596-15, *William Dewayne White v. State*.

[21] *See Celis v. State*, 416 S.W.3d 419, 432 (Tex. Crim. App. 2013) (plurality) ("Because that statute does not require proof of a culpable mental state as to the licensing or good-standing elements, the mistake-of-fact instruction appellant sought did not negate the kind of culpability required for the offense.").

section 6.04(b)(1) in this case and no independent basis for entitlement to a mistake-of-fact instruction.[22]

Thompson and *Louis* should be reconsidered.

It might be possible to simply distinguish this case from the facts and offenses of *Thompson* and *Louis*, both of which concerned transferred intent within a statute that defines the offense level by the degree of injury intended.[23] But the facts of this case reveal a fundamental problem with *Thompson* that should not be avoided.

First, the avoidance of punishment beyond one's actual culpability is no less an issue when the intent is "transferred" by the offense itself rather than by section 6.04(b)(1). If holding one accountable for the harm he causes is unfairly harsh in one setting, it should be unfairly harsh in the other.

Second, and more importantly, the case reconsidered in *Thompson*—*Honea v. State*—contains the very problem presented in this case and so should never have been the basis for the transfer of intent from lesser to greater offenses. Honea was convicted of aggravated robbery and argued that there was no evidence he intentionally and knowingly caused serious bodily injury.[24] The Court, citing section

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[22] Appellant was "subject to a transferred intent provision" because it was submitted in error. 4 RR 16. This Court presumably did not intend the windfall that strict adherence to *Thompson* and *Louis* provided in this case.

[23] TEX. PENAL CODE § 22.04(e), (f) (setting offense level for "injury to a child").

[24] *Honea*, 585 S.W.2d at 684-85.

6.04, *inter alia*, held it "well settled that one who, intending to commit a felony, accidentally commits another felony, is guilty of the felony actually committed. The intent to commit the contemplated offense transfers to the offense in fact committed."[25] It reiterated: "Appellant clearly intended to rob Cornelius; his acts resulted in the offense of aggravated robbery, and he is guilty of that offense."[26] Honea also argued he was entitled to an instruction on mistake. The Court again cited the rule that a defendant who intends to commit one felony but "commits another felony by mistake" is guilty of the felony committed.[27] "There is no doubt that appellant intended to rob Cornelius; no mistake of fact issue was raised."[28]

The Court in *Honea* was ultimately correct on both counts but for the wrong reasons. The elements of aggravated robbery are analogous to aggravated assault: "A person commits an offense if he commits robbery as defined in Section 29.02, and he . . . causes serious bodily injury to another."[29] As in this case, it was not necessary to apply the law of transferred intent to the aggravating circumstance of the greater offense because there was no requirement that Honea intended serious bodily injury. *Honea*'s restatement of the issue was correct: Honea intended robbery, the robbery

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[25] *Id*. at 685.

[26] *Id*.

[27] *Id*. at 687.

[28] *Id*. (citing TEX. PENAL CODE § 8.02).

[29] TEX. PENAL CODE § 29.03(a)(1).

resulted in serious bodily injury, and so Honea was guilty of aggravated robbery. This flows from a plain reading of the statute, not from application of a "general principle of criminal responsibility."[30] *Honea*'s rejection of mistake-of-fact should have been made on this basis, as well.

Conclusion

Thompson's summary of *Honea* was accurate but failed to recognize that *Honea* was not. By building on its flawed foundation, it created a body of law that does not withstand scrutiny. The Court's concerns are valid but misplaced; transferred intent cannot cause an actor to be "penalized far beyond his actual culpability" because it makes him actually culpable as a matter of law. However, penalization beyond culpability does occur when the State is relieved of a burden on intent that the Legislature plainly requires, as was the case in *Thompson*. This unfairness was so apparent that the Court provided a means of mitigating it before it even became an issue. The simpler solution is to not transfer intent over the expressed will of the Legislature. *Thompson* and *Louis* should be overruled.

Alternatively, this Court should clarify that the rule created in those cases does not apply when no application of section 6.04(b)(1) is required. Mistake-of-fact has meaning outside of mitigating artificially harsh transfers of intent,[31] and should not

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[30] Chapter 6 of the Penal Code is in Title 2, "General Principles of Criminal Responsibility."

[31] *Louis*, 393 S.W.3d at 253 ("The mistake-of-fact defense is broadly worded and not limited to transferred-intent situations."). *See*, *e.g.*, *Granger*, 3 S.W.3d at 41 (mistake of fact applicable

be used to circumvent the Legislature's intent to dispense with greater intents in aggravated offenses. This Court should also clarify that its special rule on entitlement does not obviate the general rule requiring that a defense be raised by evidence.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and reverse the decision of the court of appeals.

Respectfully submitted,

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because defendant claimed he did not know that the victim was in the car).

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,095 words.

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of April, 2016, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-15-00204-CR

Robert **RODRIGUEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 274th Judicial District Court, Guadalupe County, Texas
Trial Court No. 13-0979-CR-A
Honorable Gary L. Steel, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: March 23, 2016

REVERSED AND REMANDED

A jury found appellant Robert Rodriguez guilty of aggravated assault—serious bodily injury, and the trial court sentenced him to twelve years' confinement and a fine. On appeal, Rodriguez contends the trial court erred in denying his request for a jury instruction on mistake of fact. We reverse the trial court's judgment and remand the matter to the trial court.

BACKGROUND

Around 1:00 a.m., Omar Avila, a disc jockey for Club Azul, was leaving work. As he was getting into his car, two men approached and asked for a ride. Mr. Avila testified the men had

been inside the club and they were "rowdy." When Mr. Avila refused to give them a ride, the men, later identified as brothers Anthony Rodriguez ("Anthony") and Robert Rodriguez, became upset and "got in [Avila's face]." Mr. Avila, who admitted he was afraid, hurriedly got into his car and locked the doors. As he was backing up, the men began hitting the windows "trying to bang them in." The men continued to follow him, "yelling stuff." Mr. Avila, instead of heading to his original destination, drove to a nearby gas station where he called the club manager to tell him about the men. The manager told Mr. Avila a man "had just gotten beaten up." Mr. Avila then saw the men running away from the club; he followed them and called 911.

Shortly after Mr. Avila left the premises, a married couple, Maricella Plaud-Acosta and her husband Francisco Plaud-Acosta, walked out of the club. They were accosted by the same men, who again demanded a ride. The couple refused and walked to their SUV. Ms. Plaud-Acosta got in on the driver's side of the SUV, but as her husband attempted to get in on the passenger side, Anthony charged at him, preventing him from closing the door. Mr. Plaud-Acosta had one foot in the SUV and one foot out. Anthony demanded, "Give me the f_____ key and get the f___ out of the truck." Mr. Plaud-Acosta testified that when he tried to push Anthony away, Anthony grabbed the chain around his neck and pulled him out of the SUV. Mr. Plaud-Acosta stated that as they struggled, Rodriguez "started running around a car that was parked next to us," and began "hitting me from behind." As a result of the blows from behind, Mr. Plaud-Acosta dropped to his knees. At that point, both men began hitting and kicking him. Mr. Plaud-Acosta said the attack stopped when others came out of the club and said they were calling the police. Others testified the attack stopped only when police arrived. It is undisputed that Anthony and Rodriguez ran away. Mr. Plaud-Acosta suffered serious injuries, including a broken nose, severely swollen eyes, and a fracture to his tibia platea — the bone at the bottom of the knee. An orthopedic surgeon described

the knee as "smashed" and "trashed." It required surgery, followed by a long recovery period and physical therapy.

Ms. Plaud-Acosta testified that after the attack on her husband began, she ran back to the club for help. Several people came out of the club. Two witnesses testified the brothers were still assaulting Mr. Plaud-Acosta when they came out of the club. One of those witnesses testified the brothers were laughing as they struck Mr. Plaud-Acosta.

The police arrived and began searching for the brothers. The brothers were quickly found — Mr. Avila had seen them run across the street and attempt to hide. Officers took the brothers back to the club where they were identified as the attackers; the officers arrested the men. A grand jury indicted Rodriguez for the offenses of aggravated assault—serious bodily injury and aggravated robbery. The State abandoned the aggravated assault—serious bodily injury charge, proceeding only on the aggravated robbery charge. However, as noted above, the jury found Rodriguez guilty only of the lesser included offense of aggravated assault—serious bodily injury. Ultimately, Rodriguez perfected this appeal.

ANALYSIS

In this appeal, Rodriguez raises a single issue. He contends the trial court erred in denying his requested instruction on mistake of fact. The State counters, arguing the instruction was properly denied, but even if the trial court erred, the error was harmless.

Standard of Review

In reviewing claims of jury charge error, we engage in a two-step process. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether the charge was erroneous, and if it was, we then determine whether the error was harmful. *Cortez*, 469 S.W.3d at 598; *Kirsch*, 357 S.W.3d at 649.

Application

During the charge conference, the trial court announced its intention to include an instruction on transferred intent. The transferred intent instruction was included, according to the trial court, because Rodriguez may have intended to cause only bodily injury, i.e., may have committed an assault, but his actions resulted in Mr. Plaud-Acosta suffering serious bodily injury, i.e., may have committed aggravated assault. *See* TEX. PENAL CODE ANN. § 6.04(b)(1) (West 2011) (stating that person is criminally responsible for causing result if only difference between what actually occurred and what he desired, contemplated, or risked is that different offense was committed). The State obviously concurred with the trial court's assessment, stating during closing argument that transferred intent was "bad" for Rodriguez because Rodriguez "intended to cause Mr. Plaud-Acosta injury and ended up causing him serious bodily injury and he's responsible for that."

Rodriguez objected to the transferred intent instruction, but the trial court overruled his objection. Thereafter, Rodriguez requested a charge on mistake of fact. Mistake of fact is a defense wherein the defendant, through mistake, forms a reasonable belief about a matter of fact that negates the culpability required for the offense charged. *See* TEX. PENAL CODE ANN. § 8.02(a). In this case, Rodriguez argues he may have intended to cause bodily injury to Mr. Plaud-Acosta, but through mistake, he may have caused serious bodily injury, entitling him to the requested instruction. The trial court disagreed and refused to include an instruction on mistake of fact.

Rodriguez relies on *Thompson v. State*, 236 S.W.3d 787 (Tex. Crim. App. 2007) and *Louis v. State*, 393 S.W.3d 246 (Tex. Crim. App. 2012) in support of his claim that the trial court erred in refusing to include a mistake-of-fact instruction in the jury charge. In each of those cases, the Texas Court of Criminal Appeals was asked to decide whether a defendant was entitled to a

mistake-of-fact instruction when the jury charge included an instruction on transferred intent. *See Louis*, 393 S.W.3d at 252; *Thompson*, 236 S.W.3d at 800.

The State argues neither case compels the result sought by Rodriguez. The State points out that in *Thompson*, the court stated that where the charge includes an instruction on transferred intent, mistake of fact ***may*** be raised as a defense. 236 S.W.3d at 800 (emphasis added). Moreover, although the court seemed to suggest that the use of a transferred intent instruction entitled the defendant to an instruction on mistake of fact, the court never reached the issue of whether the defendant in the case was actually entitled to a mistake-of-fact instruction because Thompson failed to request its inclusion in the charge. *Id.* (citing *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998) (holding that unless defendant timely requests jury instruction on defensive issue, he may not complain about its absence on appeal)). Thus, the court's statements regarding transferred intent mandating an instruction on mistake of fact when requested was merely dicta. We agree *Thompson* does not, by itself, compel the result sought by Rodriguez. However, *Thompson*, when coupled with the court's decision in *Louis*, is another matter.

In *Louis*, the court was again called upon to determine whether the defendant was entitled to a mistake-of-fact instruction based on the trial court's decision to give an instruction on transferred intent. 393 S.W.3d at 252. In that case, the State argued, as it does here, that the language in *Thompson* was dicta, *Thompson* was wrongly decided, and is unsupportable in its application. *Id.* The State also argued in *Louis*, as it does here, that to be entitled to a mistake-of-fact instruction, the defendant still must "produce a fact about which he was mistaken, rather than simply denying the requisite mental state." *Id.* The defendant in *Louis* argued, much as Rodriguez does, that because he requested a mistake-of-fact instruction and the trial court instructed the jury on transferred intent, i.e., the defendant is criminally responsible for causing serious bodily injury — the offense of aggravated assault — even if he did not intend the injury to be serious as long as

he intended or knew his conduct would cause bodily injury — the offense of assault, he was entitled to an instruction on mistake of fact. *Id.* at 253.

The court of criminal appeals set out the language in the statutes governing transferred intent and mistake of fact. *Id.* (citing TEX. PENAL CODE ANN. §§ 6.04(b)(1), 8.02(a)). The court then reviewed its decision in *Thompson*. The court specifically stated:

> We held in *Thompson* . . . that a defendant who is subject to a transferred intent provision is entitled, upon request, to a mistake-of-fact instruction.

Id. Thus, the court held that because the trial court gave the jury an instruction on transferred intent and Louis requested an instruction on mistake of fact, he was entitled to have a mistake-of-fact instruction included in the jury charge. *Id.* at 254.

Applying *Louis* to the case before us, we hold that because the trial court gave the jury an instruction on transferred intent, i.e., instructed the jury it could find Rodriguez guilty of aggravated assault even if he only intended to commit the offense of assault, and Rodriguez requested a mistake-of-fact instruction, the trial court erred in refusing Rodriguez's request. *See id.* at 253–54. We must now determine whether the failure to include the requested mistake-of-fact instruction harmed Rodriguez.

In *Louis*, the court of criminal appeals recognized that because Louis had requested the omitted instruction, it had to determine whether he suffered "some harm." *Id.* at 254 (citation omitted). The court agreed with the holding of the court of appeals, which determined that because Louis's mental state was a "hotly contested issue" and his primary defense was that he did not intend to cause serious bodily injury or death, "[t]he failure to instruct the jury on the defense of mistake of fact was an impediment to [Louis's] ability to present his defense that he did not have the requisite *mens rea* to be found guilty and to argue that defense to the jury." *Id.* (citation

omitted). The court recognized that when the absence of a requested instruction effectively denies a defendant the right to present his defense, the error is not harmless. *Id.*

Here, Rodriguez was subjected to the same impediment as Louis. In the absence of the requested mistake-of-fact instruction, Rodriguez was unable to effectively argue that although he might have intended to cause bodily injury, i.e., an assault, in an effort to aid his brother, he did not intend to cause serious bodily injury, i.e., committed an aggravated assault. *See id.* The evidence showed that for a fight, the injuries suffered by Mr. Plaud-Acosta were unusual — the doctor testified the injuries he suffered are more of the type seen in car accidents or a fall from a significant height. It would not be unreasonable for Rodriguez to be mistaken about the type of injuries his actions — pushing, hitting and kicking the victim — would cause. However, because the trial court failed to give the requested instruction on mistake of fact, Rodriguez was unable to effectively present this defense, subjecting him to some harm.

CONCLUSION

Based on the foregoing, we sustain Rodriguez's sole issue. We hold the trial court erred in refusing to give the requested mistake-of-fact instruction and as a result, Rodriguez suffered some harm. Accordingly, we reverse the judgment and remand this matter to the trial court for further proceedings consistent with this court's opinion.

Marialyn Barnard, Justice

Publish