In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00143-CR

JOSE ANTONIO GUERRERO-YANEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 19th District Court
McLennan County, Texas
Trial Court No. 2012-2234-C1, Honorable George Allen, Presiding

April 28, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Appellant Jose Antonio Guerrero-Yanez appeals from his convictions by jury of three counts of aggravated sexual assault of a child[1] and four counts of indecency with a child by contact.[2] He was sentenced to imprisonment for life on each of the three assault counts, and for 20 years on each of the remaining counts. Through two issues,

[1] TEX. PENAL CODE ANN. § 22.021 (West 2014).

[2] TEX. PENAL CODE ANN. § 21.11 (West 2014).

appellant contends he was egregiously harmed by the trial court's charge to the jury. We will affirm.

Background

Because appellant does not challenge the sufficiency of the evidence to support his convictions, we will relate only those facts necessary to the disposition of his appellate issues. TEX. R. APP. P. 47.1.

The victims of the offenses were C.M., a child then five years old, and J.G., her younger sister. C.M.'s adult cousin testified that C.M. made an outcry after she gave the child a bath. C.M. told her cousin that appellant, "her stepdad, had used his two fingers and would scratch her in her private area."

C.M. also testified at trial, telling the jury the digital penetration happened "maybe about ten" times. She also indicated appellant caused his penis to contact her sexual organ. She further stated she saw appellant touch J.G.'s private part with his hand and his penis, and saw that J.G. touched appellant's penis.

C.M. described additional acts by appellant, not alleged in the indictment. She detailed incidents in which appellant touched the inside of her private area with a "spoon" and a "fork." She also testified appellant kissed her on the lips.

The jury also heard from medical witnesses and psychologists. Appellant, who required an interpreter, did not testify. His defense asserted he committed none of the acts against either victim. Among other witnesses, appellant called a nine-year-old

friend of C.M. who testified C.M. told her she was touched by another man, not appellant.

The trial court included in the jury charge a limiting instruction regarding the jury's use of the extraneous-offense evidence. The paragraph in the charge given at the close of the guilt-innocence phase of trial read:

> The State has introduced evidence that the Defendant has committed crimes against the alleged victims other than the offenses alleged in the Indictment in this case. You may not consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other crimes, if any were committed, and even then you may only consider the same in determining the state of mind of the Defendant and the child and the previous and subsequent relationship between the Defendant and the child, if any, in connection with the offenses alleged in the Indictment in this case, and for no other purpose. *It is not necessary that all of you agree that the Defendant committed these other crimes but unless you, as an individual juror, believe beyond a reasonable doubt that the Defendant committed these other crimes, you may not consider this evidence for any purpose.*
>
> (italics ours)
>
> The corresponding paragraph in the punishment phase charge read:
>
> The State has introduced evidence of extraneous crimes or bad acts other than the ones charged in the Indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, in determining the proper punishment for the offenses for which you have found the Defendant guilty. You may not consider such testimony for any purpose unless you, as an individual juror, believe beyond a reasonable doubt that the Defendant committed such other crimes or bad acts, if any were committed. *It is not necessary that all of you agree that the Defendant committed these other crimes or acts, but unless you, as an individual juror, believe beyond a reasonable doubt that the Defendant committed such acts, you may not consider this evidence for any purpose.* Even if you do believe beyond a reasonable doubt that the Defendant committed such acts, you may not consider them to show that he is predisposed to commit such acts but only to assist you in assessing the proper punishment in this case.
>
> (italics ours)

The language we have italicized in each instruction is the focus of appellant's complaint on appeal.

Analysis

Through two issues, appellant contends the instructions erroneously "stripped the requirement of jury unanimity among the panel" and constituted comments on the weight of the evidence.

When reviewing claims of jury charge error, we first determine whether an error exists in the charge. *Barrios v. State,* 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). If we find error and appellant objected to the error at trial, we then examine whether the error caused sufficient harm to require reversal. *Id.; Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *see Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). When, as here, the error was not brought to the attention of the trial court, we will not reverse for jury charge error unless the record shows egregious harm. *Barrios*, 283 S.W.3d at 350. Egregious harm deprives the defendant of a fair and impartial trial. *Almanza,* 686 S.W.2d at 171. In making our determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171; *see Garrett v. State*, 159 S.W.3d 717, 719-21 (Tex. App.—Fort Worth 2005), *aff'd,* 220 S.W.3d 926 (Tex. Crim. App. 2007). Jury charge error causes egregious harm to the defendant if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Taylor v. State,* 332

S.W.3d 483, 490 (Tex. Crim. App. 2011). Neither the State nor the defense has a burden to show harm. *Warner v. State*, 245 S.W.3d 458, 462, 464 (Tex. Crim. App. 2008).

Jury Unanimity

Guilt/Innocence Stage

Article 38.37 of the Code of Criminal Procedure permits introduction of evidence of "other crimes, wrongs or acts" committed by the defendant against the victim of the alleged offense to show the relationship between the victim and the defendant and their states of mind. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1(b) (West 2015). If an extraneous act is deemed admissible by the trial court, "the jurors must be instructed about the limits on their use of that extraneous act if the defendant so requests." *Ex parte Varelas,* 45 S.W.3d 627, 631 (Tex. Crim. App. 2001) (en banc) (evidence admitted under Code of Criminal Procedure article 38.36). The purpose of a limiting instruction is to "restrict evidence to its proper scope and instruct the jury accordingly." *Phillips v. State,* 193 S.W.3d 904, 911 (Tex. Crim. App. 2006) (*citing* TEX. R. EVID. 105(a)). The defendant is likewise entitled, during the guilt/innocence phase of trial, to an instruction that jurors are not to consider the extraneous act evidence unless they believe beyond a reasonable doubt the defendant committed the extraneous act. *Varelas,* 45 S.W.3d at 631.

The record does not make clear that appellant requested an instruction limiting the jury's consideration of the extraneous offense evidence to the state-of-mind and relationship purposes set out in article 38.37, section (1)(b), or an instruction telling the

jury to consider such evidence only if they believe beyond a reasonable doubt appellant committed them. Appellant's brief lauds the trial court for including both instructions in the charge, but contends the court then nullified the beneficial effect, and erred, by going on to tell the jury it need not be unanimous in its conclusion appellant committed any particular extraneous offense before considering it for the instructed purpose. The court's instruction instead told jurors the decision was an individual one with each juror.

"Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases." *Ngo,* 175 S.W.3d at 745. Addressing the question "what a jury must be unanimous about," the Court of Criminal Appeals in *Pizzo v. State* summarized the law by stating jury unanimity is required on the essential elements of the offense but is generally not required on the alternate modes or means of commission. 235 S.W.3d 711, 714 (Tex. Crim. App. 2007) (internal quotations and punctuation omitted); *see Landrian v. State,* 268 S.W.3d 532, 535 (Tex. Crim. App. 2008) (jurors must agree that defendant committed one specific crime but need not unanimously find defendant committed the crime in one specific way or even with one specific act). *See also Cosio v. State*, 353 S.W.3d 766, 771-73 (Tex. Crim. App. 2011) (jury unanimity analysis in multi-count case). Dix and Schmolesky have also characterized the jury unanimity requirement as distinguishing between "ultimate issues of guilt" as to which a jury must be unanimous and "preliminary or collateral factual issues" for which unanimity is not necessary. G. Dix and J. Schmolesky, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 43.21(3d ed. 2011).

In support of his contention the trial court's instruction was contrary to Texas law, appellant cites *Phillips v. State* on the importance of the unanimous verdict requirement. 193 S.W.3d 904, 912 (Tex. Crim. App. 2006). *Phillips* primarily addresses a trial court's failure to require the State to elect which of several occurrences it relied upon for conviction of alleged offenses. *Id*. at 912. The court noted the role an election serves in promoting unanimous verdicts. *Id*. at 911. It also rejected the State's assertion the defendant's failure to request a limiting instruction for evidence admitted under article 38.37 forfeited his right to require an election, and the notion that a limiting instruction would serve the purpose of an election. *Id*. We do not read *Phillips* to suggest, however, that jury unanimity is required for extraneous acts or offenses admitted under article 38.37. The opinion's discussion of unanimous verdicts applies to the requirement "that the jurors know precisely which act they must *all* agree he is guilty of in order to convict him." *Id*. at 910. The statement reflects a view of the unanimity requirement consistent with the court's other expressions in recent years. *See, e.g., Young*, 341 S.W.3d at 424-26; *Pizzo*, 235 S.W.3d at 714.

We cannot agree with appellant's contention the trial court's instruction contradicted Texas law on jury unanimity. Appellant cites us no authority holding Texas law requires that jurors unanimously find the accused committed a particular extraneous act, evidence of which is admitted under article 38.37, section 1(b), before jurors may consider it for the limited purpose of showing the states of mind and the relationship of the accused and the child. *See Varelas*, 45 S.W.3d at 631 (jurors to be instructed "not to consider extraneous act evidence unless they *believe* beyond a reasonable doubt" defendant committed act) (italics ours) (citing *Harrell v. State*, 884 S.W.2d 154, 157

(Tex. Crim. App. 1994) (also requiring instruction not to consider such evidence unless "they believed beyond a reasonable doubt" that defendant committed offense).[3]

Punishment Stage

Article 37.07, section 3(a) of the Code of Criminal Procedure provides for the introduction, at the punishment stage, of evidence "of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible . . . ." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a); *see Huizar v. State*, 12 S.W.3d 479, 482 (Tex. Crim. App. 2000) (article 37.07 requirement that extraneous offenses or bad acts must be proven beyond a reasonable doubt is "an evidentiary rule" having no constitutional underpinnings); *Fields v. State,* 1 S.W.3d 687, 688 (Tex. Crim. App. 1999) (describing purpose of extraneous act evidence at punishment stage).

The contention appellant here presents, that the reasonable-doubt determination required by article 37.07 must be made by the jury acting unanimously, was addressed by the Waco court of appeals in *Lakose v. State,* No. 10-09-00225-CR, 2010 Tex. App. LEXIS 6257 (Tex. App.—Waco Aug. 4, 2010, pet. ref'd) (mem. op., not designated for publication). There, the court's charge on punishment contained language to the same effect as that given in the present case, telling the jury it could not consider evidence of

[3] We note the recommended instruction on "uncharged bad acts" contained in the Texas Criminal Pattern Jury Charges, which includes the language, "You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act. Those of you who believe the defendant did the wrongful act may consider it." State Bar of Texas, TEX. CRIMINAL PATTERN JURY CHARGES: SPECIAL INSTRUCTIONS 3.1 (2015).

extraneous offenses unless "you, as an individual juror, believe beyond a reasonable doubt that the defendant committed such other crimes or bad acts . . . . It is not necessary that all of you agree . . . ." 2010 Tex. App. LEXIS 6257, at * 2-3. The court rejected the defendant's contention the trial court erred by instructing the jury that unanimity was not required with regard to extraneous-offense evidence. It noted article 37.07 requires the jury to agree unanimously on the amount of punishment. But, the court held, extraneous offenses are merely "additional information," "foundational matters," or "preliminary factual issues" used to assess punishment, and the jury need not agree on the specific extraneous offense or offenses underlying its general verdict on punishment. *Id. at* * 7-8 (citations omitted). We will follow the Waco court of appeals' holding in this case.[4] Accordingly, we find the trial court, in its charge on punishment, did not err by instructing the jury that a determination appellant committed an extraneous offense shown by the evidence need not be unanimous.

Appellant's first issue is overruled.

Comment on the Weight of the Evidence

By his second issue, appellant contends the trial court impermissibly commented on the weight of the evidence by its instructions permitting non-unanimous determinations that appellant, beyond a reasonable doubt, committed extraneous offenses shown by the evidence.

[4] This case was transferred to our court from the Tenth Court of Appeals by order of the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013); TEX. R. APP. P. 41.3 (precedent of transferor court).

Guilt/Innocence Stage

The sentence from the guilt/innocence charge appellant challenges is a part of the instruction limiting the purposes for which the jury might consider evidence of extraneous offenses, and instructing jurors not to consider such evidence for any purpose unless they find, beyond a reasonable doubt, appellant committed the act. An instruction limiting the jury's consideration of an item of evidence to certain purposes is not an impermissible comment on the weight of the evidence because it would be impossible to limit the jury's consideration without pointing out the evidence subject to the limitation. *Bartlett v. State,* 270 S.W.3d 147, 151 (Tex. Crim. App. 2008). Nor does appellant assert the court improperly commented on the weight of the evidence by instructing jurors they must believe, beyond a reasonable doubt, he committed an extraneous offense before they may consider it. *See Varelas,* 45 S.W.3d at 631 (defendant entitled to such an instruction on request); *Easter v. State*, 867 S.W.2d 929, 941 (Tex. App.—Waco 1993, pet. ref'd) (instruction given to benefit the accused cannot be a basis of his complaint) (*citing Bell v. State,* 768 S.W.2d 790, 798 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd)).

Appellant's argument is that the court's comment on the weight of the evidence occurred in the instruction's last sentence: "It is not necessary that all of you agree that the Defendant committed these other crimes but unless you, as an individual juror, believe beyond a reasonable doubt that the Defendant committed these other crimes, you may not consider this evidence for any purpose." The latter part of the sentence merely reiterates the instruction of the previous sentence, telling jurors they may not consider the evidence for any purpose unless they believe beyond a reasonable doubt

appellant committed the extraneous offenses. The improper comment on the evidence's weight, then, comes if at all from the sentence's first part, telling jurors the reasonable-doubt decision is an individual one for each juror.

Appellant's primary contention on appeal is that the challenged language permitting individual juror decisions on reasonable doubt is contrary to Texas law. We have stated our disagreement with that contention. Dix and Schmolesky, cited by appellant, refer to instances in which courts have found improper comments on the weight of the evidence even in correct statements of the law, because of the instruction's tendency to draw attention to particular evidence. *See* G. Dix and J. Schmolesky, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 43.27 (3d ed. 2011) (citing *Russell v. State*, 43 S.W.3d 66 (Tex. App.—Waco 2001, no pet.)).[5] In this instance, of course, the instruction could draw attention only to the evidence presented by the State showing appellant guilty of unindicted offenses. Even assuming, however, it could be said that the language appellant challenges here constitutes a impermissible comment on the weight of the evidence, review of the record does not disclose appellant suffered egregious harm. *See Almanza*, 686 S.W.2d at 174 (harm must be actual, not merely theoretical).

Considering the jury charge as a whole, we note first it makes clear members of the jury are required to agree unanimously on which of the indicted acts, if any, were committed by appellant. It also is immediately apparent that, to the degree the charge highlighted the evidence of extraneous offenses, the highlighting was accomplished by

[5] *See also Walters v. State*, 247 S.W.3d 204, 214 (Tex. Crim. App. 2007) (addressing instruction that would focus jury's attention on specific type of evidence); *Brown v. State*, 122 S.W.3d 794, 801 (Tex. Crim. App. 2003).

the entire paragraph containing the limited-purpose and reasonable-doubt instructions applicable to extraneous offenses. The bulk of the paragraph is beneficial to appellant. The language appellant finds objectionable does not focus the jury's attention on extraneous-offense evidence to any greater extent than does the remainder of the paragraph.

The state of the evidence does not support a finding of egregious harm. The primary issue at trial was the credibility of eight-year-old C.M. As noted, the extraneous-offense evidence arises from her testimony that appellant touched her sexual organ with a spoon and a fork, in addition to his digital and penile contact. Her descriptions of the events were brief and contained little detail. Appellant's defense at trial asserted he did not commit any of the acts of which he was accused. We see no reason to think any juror was more likely to believe C.M.'s testimony of the extraneous offenses than that supporting the indicted offenses.

No mention was made during argument of the charge language of which appellant complains. Appellant's argument focused on attacking C.M.'s credibility. Counsel used the utensil testimony as an example of her incredible testimony, referring to her story of contact with a spoon and fork as "bizarre."[6] Counsel also highlighted inconsistencies in C.M.'s testimony and argued she was coached. The prosecutor responded briefly in closing argument, asserting the utensil incidents were not fantastic but typical of perverted conduct. We do not find in the argument of counsel an indication of egregious harm from the charge language.

[6] During argument, counsel also rhetorically asked why appellant had not been charged with assaulting C.M. with kitchen utensils. She answered her question with the assertion "he's not been charged . . . because the State doesn't even believe it."

Considering the entire record, we are unable to conclude that the presence in the charge of the language permitting non-unanimous reasonable-doubt determinations regarding extraneous offenses affected the very basis of the case, deprived appellant of a valuable right, or vitally affected a defensive theory. *Taylor*, 332 S.W.3d at 490. Accordingly, we conclude he did not suffer egregious harm from the charge's language.

Punishment

The punishment-stage charge clearly stated that the jury must be unanimous in its assessment of punishment. Appellant's extraneous offenses were not mentioned during the punishment stage of trial. For the same reasons we have discussed concerning the guilt-innocence stage, we cannot agree appellant suffered egregious harm from the inclusion in the punishment-stage charge of language permitting non-unanimous reasonable-doubt determinations regarding extraneous offenses.

Appellant's second issue is overruled.

Conclusion

Having resolved both of appellant's issues against him, we affirm the judgments of the trial court.

James T. Campbell
Justice

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