In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00015-CR

BRUCE DENIS YOUNG, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 424th District Court
Llano County, Texas
Trial Court No. CR6794, Honorable Evan C. Stubbs, Presiding

July 20, 2016

MEMORANDUM OPINION

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

A jury convicted appellant Bruce Denis Young of aggravated sexual assault of a child[1] and assessed punishment at thirty-five years in prison and a fine of $10,000. The trial court imposed sentence accordingly. On appeal, appellant presents a single issue contending he was egregiously harmed by the trial court's failure, sua sponte, to charge the jury on the lesser-included offense of indecency with a child. Because we find the

[1] TEX. PENAL CODE ANN. § 22.021(a)(2)(B) (West Supp. 2015).

trial court did not err in the complained-of manner, no egregious-harm analysis is required. We will affirm the judgment.

Background

The material facts of the case and the evidence adduced at trial are known to the parties and need not be stated here because of the nature of appellant's issue. At trial, appellant did not request that the court include a lesser-included-offense instruction in the jury charge, nor did he object to its omission from the charge. Following his conviction appellant timely noticed this appeal. By order of the Supreme Court of Texas, the case was transferred to this court from the Third District Court of Appeals, at Austin.[2]

Analysis

In his sole issue, appellant argues the trial court's failure to sua sponte submit a jury charge containing an instruction on the lesser-included offense of indecency with a child caused him egregious harm. *See Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App.1985) (op. on reh'g) (explaining egregious-harm analysis).

A party must generally make a proper objection in the trial court to preserve the error for appeal. *See* TEX. R. APP. P. 33.1(a). However, in criminal cases courts may "take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX. R. EVID. 103(e). Fundamental error includes jury-charge error that causes egregious harm. *Saldano v. State,* 70 S.W.3d 873, 887-89 (Tex. Crim. App. 2002); *Baker v. State,* No. 02-14-00157-CR, 2015 Tex. App. LEXIS 846, at *4-5 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (per curiam, mem. op. on

[2] TEX. GOV'T CODE ANN. § 73.001 (West 2013).

reh'g, not designated for publication). Reversal on a claim of egregious harm is possible "only if the error was fundamental in the sense that it was so egregious and created such harm that the defendant was deprived of a fair and impartial trial." *Villarreal v. State,* 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); *Almanza,* 686 S.W.2d at 171-72.

Before reaching an egregious-harm analysis, the appellate court must first determine whether the trial court erred by its failure to sua sponte instruct the jury on a lesser-included offense. *Tolbert v. State,* 306 S.W.3d 776, 779 (Tex. Crim. App. 2010). "The trial judge has an absolute sua sponte duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged." *Delgado v. State,* 235 S.W.3d 244, 249 (Tex. Crim. App. 2007); *Posey v. State,* 966 S.W.2d 57, 62 (Tex. Crim. App. 1998) (stating trial court is bound by statute to submit a charge providing the law applicable to the case); TEX. CODE CRIM. PROC. ANN. art. 36.14. (West 2007) ("[T]he judge shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case"). "But it does not inevitably follow that [the trial court] has a similar sua sponte duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues." *Delgado,* 235 S.W.3d at 249. Whether the trial court has such a sua sponte duty to instruct depends on whether the lesser-included offense was applicable to the case. *Tolbert,* 306 S.W.3d at 779. For example, in *Posey* the court held a trial court was not obligated to sua sponte give an instruction on a mistake of fact defensive issue "because a defensive issue is not applicable to the case unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge." *Tolbert,* 306 S.W.3d at

779-80 (internal quotation marks omitted) (citing *Posey,* 966 S.W.2d at 62);[3] *Lopez v. State,* No. 04-13-00306-CR, 2014 Tex. App. LEXIS 8512, at *3 (Tex. App.—San Antonio Aug. 6, 2014, pet. refused) (mem. op., not designated for publication) (citing *Tolbert,* 306 S.W.3d at 781) ("A lesser-included offense is a defensive issue that is not the law applicable to the case unless the defendant requests the issue or objects to its omission from the charge" (internal quotation marks omitted)).

That submission of a lesser-included instruction depends on a proper defense request or timely objection is a logical requirement because "lesser-included instructions are like defensive issues and . . . a trial court is not statutorily required to sua sponte instruct the jury on lesser-included offenses because these issues frequently depend upon trial strategy and tactics." *Tolbert,* 306 S.W.3d at 780; *Zamora v. State,* 411 S.W.3d 504, 513 (Tex. Crim. App. 2013) (defensive issues "involve strategic decisions and tactics generally left to the lawyer and the client").

In *Tolbert,* a capital murder case, the Court of Criminal Appeals thus concluded charge error authorizing application of the egregious-harm analysis was not shown. *Tolbert,* 306 S.W.3d at 782. It explained the trial court had "no duty to sua sponte instruct the jury on the lesser-included offense of murder and that a jury instruction on this lesser-included offense was not applicable to the case absent a request by the defense for its inclusion in the jury charge." *Id.* at 781. The court made clear the

[3] The court explained in *Tolbert* its decision in *Posey* was purposed "to discourage parties from sandbagging or lying behind the log and to discourage a defendant from retrying the case on appeal under a new defensive theory, effectively giving the defendant two bites at the apple." *Tolbert,* 306 S.W.3d at 780 n.6 (internal quotation marks omitted) (citing *Posey,* 966 S.W.2d at 63).

State's unsuccessful request for a lesser-included instruction did not of itself make such an instruction on murder applicable to the case. *Id.* at 782-83.

Appellant argues that because the record contains no indication he opposed or expressly waived a lesser-included offense instruction on indecency with a child, we should search the record for any indication of a strategic motive for his failure to request the instruction and finding none we should then conduct an *Almanza* egregious-harm analysis. He asserts some courts of appeals have found it important that the defendant in *Tolbert* apparently opposed the inclusion of an instruction on the lesser-included offense of murder, 306 S.W.3d at 778, and have examined the record in cases under review to determine whether the defendant pursued a strategy inconsistent with a lesser-included-offense instruction. The State disputes appellant's analysis of the *Tolbert* opinion and cases following it, and, alternatively, argues the record demonstrates appellant's all-or-nothing strategy.

To dispose of this appeal, we need not evaluate appellant's view of the *Tolbert* opinion and its progeny. In this transfer case, we will apply the law of the transferor court, the Third Court of Appeals. Appellant and the State cite us to an opinion of the Third Court expressing that court's view of the issue, and we will be guided by that opinion. In *Turner v. State,* No. 03-12-00285-CR, 2014 Tex. App. LEXIS 8706 (Tex. App.—Austin Aug. 8, 2014, pet. refused) (mem. op. on reh'g, not designated for publication), the defendant was charged with intentionally or knowingly causing serious bodily injury to a child. She did not request a lesser-included-offense instruction on reckless injury to a child and did not object to the omission of the instruction from the jury charge. *Id.* at *16-17. On appeal she argued the omission of a reckless injury to a child instruction caused her egregious harm. Disagreeing that the record demonstrated

charge-error warranting an egregious-harm analysis, the court explained that a lesser-included-offense instruction was not applicable to the case unless requested by the defendant. *Id.* at *17. Because the charge was not erroneous, the court did not conduct an egregious-harm analysis. *Id.* at *18. *See also King v. State,* No. 03-12-00105-CR, 2014 Tex. App. LEXIS 4503, at *12-13 (Tex. App.—Austin Apr. 25, 2014, pet. refused) (mem. op., not designated for publication) (stating in capital murder case because the defendant "did not request an instruction on felony murder or object to its absence, that lesser-included offense is not applicable to the case, and the trial court did not err by omitting an instruction on that offense"; because there was no charge error the court did not undertake the egregious-harm analysis).

In the present case, as noted, appellant chose not to request a lesser-included-offense instruction and voiced no objection to the charge. These decisions may well have been strategic. In any event, we find that absent a proper request or timely objection, the trial court here had no duty to submit a lesser-included-offense instruction on indecency with a child. And because the trial court did not commit the charge error of which appellant complains there is no basis for undertaking the *Almanza* egregious-harm analysis. Appellant's issue is overruled.

Conclusion

Having overruled appellant's sole issue on appeal, we affirm the judgment of the trial court.

James T. Campbell
Justice

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