IN THE
TENTH COURT OF APPEALS

No. 10-16-00049-CR

JAMES ALFRED JARRETT, JR.,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 18th District Court
Johnson County, Texas
Trial Court No. F47817

MEMORANDUM OPINION

In three issues, appellant, James Alfred Jarrett Jr., challenges his convictions for indecency with a child by contact. *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011). Specifically, Jarrett contends that the trial court erred: (1) by proceeding with eleven jurors after determining that one juror was disabled; (2) in denying his motion for mistrial based on proceeding with eleven jurors; and (3) failing to include in the jury charge an instruction requiring jury unanimity as to a specific act of criminal conduct. We affirm.

I. BACKGROUND

Here, Jarrett was charged by indictment with: (1) one count of continuous sexual abuse of a young child, one of his stepdaughters, H.J.; (2) two counts of indecency with a child by contact pertaining to H.J.; and (3) two more counts of indecency with a child by contact pertaining to another stepdaughter, C.K. At the conclusion of the trial, the jury acquitted Jarrett of the continuous-sexual-abuse-of-a-young-child count and one count of indecency with a child by contact allegedly occurring on or about November 1, 2012, and involving H.J. The jury found Jarrett guilty of the remaining three counts of indecency with a child by contact. For two of the counts, the jury assessed punishment at seven years' confinement in the Institutional Division of the Texas Department of Criminal Justice with $5,000 fines. For the remaining count, Jarrett received a ten-year prison sentence and a $10,000 fine, both of which were probated for ten years. At the urging of the State, the trial court ordered that the seven-year prison sentences run consecutively and that the probated sentence run concurrently with the other sentences. Jarrett filed a motion for new trial, which was overruled by operation of law. *See* TEX. R. APP. P. 21.8(a), (c). This appeal followed.

II. THE JURY AND JARRETT'S MOTION FOR MISTRIAL

In his first and second issues, Jarrett complains about the jury. In particular, Jarrett contends that the trial court abused its discretion in ruling that a seated juror was disabled under article 36.29 of the Code of Criminal Procedure and denying his motion for mistrial

based on proceeding with eleven jurors. *See* TEX. CODE CRIM. PROC. ANN. art. 36.29 (West Supp. 2016). We disagree.

A. Juror Disability

If "a juror dies or, as determined by the judge, becomes disabled from sitting" during a felony trial before the charge has been read to the jury, then the trial may proceed to verdict without that juror. *Id.* art. 36.29(a). "A juror is considered disabled if she has a 'physical illness, mental condition, or emotional state' which hinders her ability to perform her duties as a juror." *Hill v. State*, 90 S.W.3d 308, 315 (Tex. Crim. App. 2002) (quoting *Landrum v. State*, 788 S.W.2d 577, 579 (Tex. Crim. App. 1990)). A juror may also be considered "disabled" if she has "any condition that inhibits [her] from fully and fairly performing the functions of a juror." *Routier v. State*, 112 S.W.3d 554, 588 (Tex. Crim. App. 2003) (quoting *Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000)).

We review a trial court's determination that a juror is disabled under an abuse-of-discretion standard. *Id.* (citing *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999)). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). In other words, an abuse of discretion occurs only if we can say with confidence that no reasonable perception of the matter under consideration could have yielded the decision made by the trial court. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op.

on reh'g); *see also Rodriguez v. State*, No. 10-12-00073-CR, 2013 Tex. App. LEXIS 2388, at *4 (Tex. App.—Waco Mar. 7, 2013, no pet.) (mem. op., not designated for publication).

In the middle of trial, juror Gloria Garza informed the trial court that her daughter, Giavana, and H.J. were best friends throughout elementary and part of junior high school. Due to their close relationship, H.J. told Giavana in 2009 that her stepfather was touching her inappropriately. Giavana related this information to Gloria, who later approached H.J. and inquired about the allegations. According to Gloria, H.J. only responded that her stepfather was molesting her. She did not reveal any additional details. Not knowing Jarrett or how to properly handle the situation, Gloria recommended that H.J. tell someone she trusted about the allegations.

Approximately six years after this incident, Gloria was chosen to serve as a juror in this case. With the passage of time, among other changes, Gloria's recollection of the allegations faded. However, she remembered the allegations following the testimony of H.J.'s grandmother and at the time the State called H.J. to testify. During a break, Gloria sent a text message to Giavana inquiring about the name of her childhood friend. After hearing H.J.'s last name, Gloria realized that one of the victims in this case was Giavana's childhood friend, H.J. At this point, Gloria informed the trial court about the situation.

During questioning by the State, Gloria acknowledged having trouble with remaining fair and impartial in this proceeding. She believed that the relationship between Giavana and H.J. would play a role in her deliberations and would make it hard

to be impartial. Over defense counsel's argument that Gloria was not disabled under article 36.29, the trial court determined that Gloria was indeed disabled. Jarrett moved for a mistrial; however, the trial court denied Jarrett's motion for mistrial, and the trial proceeded with eleven jurors.

Though bias or prejudice in favor of or against the defendant does not constitute a disability within the meaning of article 36.29(a), *see Carrillo v. State*, 597 S.W.2d 769, 771 (Tex. Crim. App. 1980), a bias or prejudice that puts the juror in an emotional state such that it prevents her from fully and fairly performing her duties as a juror may render the juror disabled. *See Reyes*, 30 S.W.3d at 412. Here, Gloria noted that she would have trouble being impartial because of the long prior relationship Giavana had with H.J., and because of Gloria's emotional connection with H.J., which included H.J. confiding in Gloria about instances of sexual abuse at the hands of Jarrett. Based on our review of the record, we conclude that the aforementioned testimony demonstrates that Gloria was in an emotional state that prevented her from fully and fairly performing her duties as a juror. *See id.* As such, we cannot say that the trial court abused its discretion in concluding that Gloria was disabled under article 36.29(a) of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.29(a); *Routier*, 112 S.W.3d at 588; *see also Reye*s, 30 S.W.3d at 412.

B. The Motion for Mistrial

As noted earlier, Jarrett also complains that the trial court abused its discretion in denying his motion for mistrial and proceeding with eleven jurors. We review the denial of a motion for mistrial under an abuse-of-discretion standard. *Archie v. State*, 221 S.W.3d 695, 699-700 (Tex. Crim. App. 2007). Under this standard, we uphold the trial court's ruling as long as the ruling is within the zone of reasonable disagreement. *Id.* "'A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile.'" *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)). It is appropriate only for "a narrow class of highly prejudicial and incurable errors." *Id.*; *see Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). Therefore, a trial court properly exercises its discretion to declare a mistrial when, due to the error, "an impartial verdict cannot be reached" or a conviction would have to be reversed on appeal due to "an obvious procedural error." *Wood*, 18 S.W.3d at 648; *see Ladd*, 3 S.W.3d at 567.

In this case, there is no evidence an impartial verdict could not be reached due to proceeding with eleven jurors. Gloria did admit to telling one juror that she knew H.J.; however, she denied making any other statement regarding the case to anyone. Other than insisting that Gloria was not disabled under article 36.29(a), Jarrett does not direct us to evidence demonstrating that the trial court abused its discretion by denying his

motion for mistrial. *See Archie*, 221 S.W.3d at 699-700; *see also* TEX. CODE CRIM. PROC. ANN. art. 36.29(a) ("Not less than twelve jurors can render and return a verdict in a felony case. . . . Except as provided in Subsection (b), however, after the trial of any felony case begins and a juror dies or, as determined by the judge, becomes disabled from sitting at any time before the charge of the court is read to the jury, *the remainder of the jury shall have the power to render the verdict* . . . ." (emphasis added)). Accordingly, we overrule Jarrett's first two issues.

III. THE JURY CHARGE

In his third issue, Jarrett asserts that the trial court erred by failing to include in the jury charge an instruction requiring jury unanimity as to a specific act of criminal conduct. The State concedes that the trial court erred in failing to include the unanimity instruction in the charge; however, according to the State, Jarrett "did not suffer reversible harm from the jury-charge error."

A. Unanimity

A jury must reach a unanimous verdict about the specific crime the defendant committed. *See* U.S. CONST. amends. V, XIV, TEX. CONST. art. V, § 13; TEX. CODE CRIM. PROC. ANN. art. 36.29(a); *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). "The jury must 'agree upon a single and discrete incident that would constitute the commission of the offense alleged.'" *Cosio*, 353 S.W.3d at 771 (quoting *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007). "[N]on-unanimity may occur when the State

charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions." *Id.* at 772.

When evidence is presented regarding multiple incidents, which would individually establish different offenses, the "[court's] charge, to ensure unanimity, would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented." *Id.*; *see Ngo v. State*, 175 S.W.3d 738, 748-49 (Tex. Crim. App. 2005). Because it is the burden of the trial court to instruct the jury as to the law applicable to the case, *see* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007), the trial court must submit a charge to the jury that "does not allow for the possibility of a non-unanimous verdict." *Cosio*, 353 S.W.3d at 776.

B. Charge Error

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). Here, the State concedes error; therefore, we proceed to the harm analysis.

If an error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Conversely, if error was not preserved at trial by a proper objection, a reversal will be granted only if the error presents egregious harm, meaning appellant did not receive a

fair and impartial trial. *Id.* To obtain a reversal for jury-charge error, appellant must have suffered actual harm and not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

The record reflects that Jarrett did not raise this objection to the jury charge in the trial court; thus, the record must show egregious harm. *See Almanza*, 686 S.W.2d at 171. In examining the record for egregious harm, we consider the entire jury charge, the state of the evidence, the final arguments of the parties, and any other relevant information revealed by the record of the trial as a whole. *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006). Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Stuhler*, 218 S.W.3d at 719; *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006).

C. Discussion

Based on our review of the charge, closing arguments, and the state of the evidence, we cannot say that Jarrett was egregiously harmed by the error in the charge. Specifically, Jarrett was charged with one count of continuous sexual abuse of a young child, H.J.; two counts of indecency with a child by contact pertaining to H.J.; and two more counts of indecency with a child by contact pertaining to C.K. With regard to the count of continuous sexual abuse of a young child, the charge stated:

> *In order to find the defendant guilty of the offense of Continuous Sexual Abuse of a Young Child, you are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed.* However, in order to find the defendant guilty of the

> offense of Continuous Sexual Abuse of a Young Child, you must agree unanimously that the defendant, during a period that is 30 days or more in duration committed two or more acts of sexual abuse.

(Emphasis added). Later in the charge, the jurors were instructed as follows:

> After you have retired, you may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the court, or anyone else concerning any question you may have. *After you have reached a unanimous verdict, the Presiding Juror, along with the ten remaining jurors, will certify thereto by filling in the appropriate forms attached to this charge and signing their names where indicated*.

(Emphasis added).

These two instructions suggest that unanimity was required for all counts, except for the one count of continuous sexual abuse of a young child. This reading of the charge was further explained during closing arguments, whereby the State contended that:

> We talk about the other counts, Two and Three which, as Mr. Dumas pointed out, deal with [H.J.]. And he's absolutely right. That when [H.J.] aged out of the continuous sexual abuse statute. Those are more acts of sexual abuse against [H.J.] that involve separate occasions when he continued to touch her genitals as she testified to. And the dates in there, we don't have to prove the exact dates. That's in the Charge. That was covered during Voir Dire. We don't have to prove the exact dates. There are two separate offenses in there, one for Count Two and one for Count Three. The date on Count Three is May 20th, 2013, and that's finally when she was able to tell when the abuse stopped. So those are the two separate indecency with a child counts that are contained in the Indictment regarding [H.J.] . . . .
>
> Now, with [C.K.], those allegations that she originally outcried to took place in 2005. And [C.K.] would've either been 12 or 13 years old. But in 2005[,] the continuous sexual abuse statute didn't exist so we can't charge somebody for a crime that didn't exist at the time that crime was committed. So those offenses that deal with [C.K.], that is for indecency with a child for

> touching her genitals, for touching her breasts back when she was either 12 or 13 years old. And again, you don't have to agree on the exact dates that these happened. You just have to agree that for Count Four that Mr. Jarrett touched the genitals of [C.K.] at least one time to arouse or gratify the—his own sexual desire. Count Five is that he touched her breast with the intent to arouse or gratify his own sexual desire. And again, you will see intent to arouse or gratify in all those counts. You know what it means when I say somebody had the intent to arouse or gratify the sexual desire of himself. We talked about that. . . .

As shown above, the State emphasized that each count was a separate offense and, when read together with the charge, informed the jury that each count required unanimity. It is also noteworthy that Jarrett contended during his closing argument that none of the incidents occurred and that the victims were lying. *See Ruiz v. State*, 272 S.W.3d 819, 826-27 (Tex. App.—Austin 2008, no pet.) (concluding that appellant was not egregiously harmed by the failure to include an instruction regarding unanimity where the defendant argued that he committed none of the alleged misconduct and that the victim was lying to get revenge on the defendant); *see also Mosqueda v. State*, No. 10-15-00168-CR, 2016 Tex. App. LEXIS 8947, at *16 (Tex. App.—Waco Aug. 17, 2016, no pet.) (mem. op., not designated for publication) (rejecting a charge-error issue based on unanimity where, among other things, the defendant emphasized in closing argument "that none of the incidents occurred and that the victim was lying").

Furthermore, we agree with the State that the jury's verdict in Count Two indicates that they were cognizant of the unanimity requirement. In Count Two, Jarrett was charged with indecency with a child by contact by allegedly touching H.J.'s genitals on

or about November 1, 2012. However, the evidence at trial showed that Jarrett began abusing H.J. sexually in 2009 and that the abuse increased in frequency until it ceased in May 2013. This testimony made it impossible for the jury to focus on the specific act of touching H.J.'s genitals on or about November 1, 2012. Accordingly, the jury rendered a unanimous verdict of "not guilty" as to this charge.

However, with respect to Counts Three through Five, the evidence corresponds with the allegations made in the indictment and the application paragraphs in the charge. Specifically, regarding Count Three, Jarrett was alleged to have touched the genitals of H.J. on or about May 20, 2013. This date marks the last instance of sexual abuse perpetrated by Jarrett against H.J. and involved the shoving of "some type of tube" inside H.J.'s vagina. Moreover, the State emphasized in its closing argument that May 20, 2013 was the date that Jarrett's sexual abuse of H.J. ended.

With respect to Counts Four and Five, the indictment and application paragraphs in the charge alleged that Jarrett engaged in two instances of indecency with a child by contact by touching the genitals and breast of C.K. on or about July 1, 2005. This date is when the four years of sexual abuse of C.K. began. C.K. testified that Jarrett began sexually abusing her after the family moved into a house in Burleson, Texas, sometime during the summer of 2005. This date also corresponded with C.K. taking summer school between June and August of 2005.

Therefore, based on the foregoing, in Counts Three through Five, we have fair assurance that the jury understood on which specific act it was to render a unanimous verdict. As such, we cannot say that the charge error in this case was so egregiously harmful that it affected the very basis of the case, deprived Jarrett of a valuable right, or vitally affected a defensive theory. *See Stuhler*, 218 S.W.3d at 719; *Sanchez*, 209 S.W.3d at 121; *Olivas*, 202 S.W.3d at 144; *Almanza*, 686 S.W.2d at 171. Accordingly, we overrule Jarrett's third issue.

IV. CONCLUSION

Having overruled all of Jarrett's issues on appeal, we affirm the judgments of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed May 10, 2017
Do not publish
[CR25]

*(Chief Justice Gray concurs in the judgment to the extent it affirms the trial court's judgments. A separate opinion will not issue.)