NO. 12-14-00263-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JEFFREY ARLEN QUINN, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Jeffrey Arlen Quinn appeals his conviction of evading arrest with a motor vehicle, for which he was sentenced to imprisonment for seventeen years. In one issue, Appellant argues that the trial court erred in submitting an incorrect charge on punishment in violation of Texas Code of Criminal Procedure, Article 37.07(4)(a). We affirm.

BACKGROUND

Appellant was charged by indictment with evading arrest with a motor vehicle. The indictment further alleged that Appellant previously had been convicted of manufacture or delivery of a controlled substance. Appellant pleaded "not guilty," and the matter proceeded to a jury trial. The jury found Appellant "guilty" as charged.

At the commencement of his jury trial on punishment, Appellant pleaded "true" to the enhancement allegation.[1] Ultimately, the jury assessed Appellant's punishment at imprisonment for seventeen years. The trial court sentenced Appellant accordingly, and this appeal followed.

[1] As a result, Appellant faced a range of punishment of two to twenty years. *See* TEX. PENAL CODE ANN. §§ 12.34(a), 12.42(a), 38.04(b)(2)(A) (West 2011 & Supp. 2015); *see also* ***Adetomiwa v. State***, 421 S.W.3d 922, 924–27 (Tex. App.–Fort Worth 2014, no pet.).

CHARGE ERROR – ARTICLE 37.07(4)(a)

In his sole issue, Appellant argues that the trial court erred in submitting an incorrect charge on punishment because the charge omitted mandatory language set forth in Texas Code of Criminal Procedure, Article 37.07(4)(a). The charge submitted to the jury read, in pertinent part, as follows:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed . . . , without consideration of any good conduct time the defendant may earn . . . . Eligibility for parole does not guarantee that parole will be granted.

TEX. CODE CRIM. PROC. ANN. art. 37.07(4)(a) (West Supp. 2015). Appellant contends that the trial court's charge erroneously omitted the following language:

> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Id.

The State concedes that the trial court's omission was erroneous. We agree. *See* ***Sanders v. State***, 448 S.W.3d 546, 548–49 (Tex. App.–San Antonio 2014, no pet.) (stating that instruction in Article 37.07(4)(a) is "constitutional, mandatory," and shall not be altered by trial court from precise language set forth therein). However, the State argues that Appellant did not suffer egregious harm as a result of the error.

Harm Analysis

All alleged jury charge error must be considered on appellate review regardless of preservation in the trial court. ***Kirsch v. State***, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

Once a court of appeals determines that error occurred, it must analyze that error for harm. ***Id.*** The issue of error preservation is not relevant until harm is assessed because the degree of harm required for reversal depends on whether the error was preserved. ***Id.*** When, as here, the defendant fails to object to the charge, we will not reverse unless the record shows "egregious harm" to the defendant. *See* ***Ngo v. State***, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005).

To determine "egregious harm," a reviewing court examines "the entire jury charge, the state of the evidence, including the contested issues and weight of the probative evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole." ***Warner v. State***, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008); *see also* ***Taylor v. State***, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). The appellant must have suffered actual, rather than theoretical, harm. ***Warner***, 245 S.W.3d at 461. Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. ***Id.*** at 461–62.

The Charge

As set forth above, the court's charge omitted some of the mandatory language from Article 37.07(4)(a).[2] Had the complete instruction from Article 37.07(4)(a) been given, the jury would have been informed on three concepts pertaining to parole. The first two paragraphs mention good conduct time and parole in a general way. ***Luquis v. State***, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002). The third paragraph makes it clear that Appellant's eligibility for parole is one-half his actual sentence, "without consideration of any good conduct time he may earn." ***Id.*** The final two paragraphs explain that no one can predict whether (and if so, how) parole or good time might be applied to the defendant and instructs the jury that it is not to consider the

[2] In addition to the omission of Article 37.07(4)(a)'s fourth and fifth paragraphs as set forth above, the charge also omitted some language from the third paragraph of the Article 37.07(4)(a) instructions. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07(4)(a). This omission from the third paragraph is represented in the above excerpts by two sets of ellipses. These omissions relate to minimum and maximum terms of the sentence that a defendant must serve before he is eligible for parole, i.e., at least two years if a defendant is sentenced to less than four years and a maximum of thirty years. Given the range of punishment Appellant faced in light of the enhancement, the jury could have assessed his punishment at imprisonment for any period between two and twenty years. *See* n.1. Thus, the language concerning the thirty year maximum term to be served before a defendant is eligible for parole has no relevance to this case because it exceeds one-half of the maximum sentence Appellant could have received by twenty years. Furthermore, while it is conceivable that the jury could have believed that Appellant, at a minimum, could be released after serving one year if he received the minimum two year sentence, it undoubtedly determined that a sentence near the maximum term of imprisonment was more appropriate. Nothing in the record leads us to conclude that any potential misconception by the jury regarding the minimum amount of time Appellant would have to serve caused it to sentence Appellant more harshly by assessing his punishment at fifteen years above the minimum allowable sentence.

manner in which parole law or good conduct time is applied to the defendant. *See* ***id.***, *see also* TEX. CODE CRIM. PROC. art. 37.07(4)(a).

Based on the plain language of the statute, it is reasonable to conclude that the inclusion of the first three paragraphs of the statute are beneficial to the State, while the inclusion of paragraphs four and five are beneficial to Appellant. Thus, the effect of the charge in the instant case is that it informed the jury about parole law and good conduct time and how it could potentially reduce Appellant's sentence. *See* ***id.*** By omitting the last two paragraphs, the jury was not instructed that it could not consider any of these concepts as they apply to Appellant. Thus, the jury potentially considered the application of parole law and good conduct time as it applied to Appellant. *See* ***Thrift v. State***, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005) (appellate court presumes jury follows trial court's instructions in manner presented).

State of the Evidence

The evidence supporting Appellant's "guilt" was strong. The jury was entitled to consider this evidence in assessing Appellant's punishment. *See* ***Klueppel v. State***, 505 S.W.2d 572, 574 (Tex. Crim. App. 1974). During the guilt-innocence phase of trial, the jury heard the testimony of City of Tool Police Chief Rodney Henderson. Henderson testified that he first encountered the Ford Ranger pickup truck driven by Appellant when it veered into the oncoming lane of traffic on State Highway 274, causing him to evasively maneuver his patrol vehicle off the roadway. Henderson further testified that Appellant led him and other officers on a lengthy high speed pursuit at speeds, which, at times, exceeded one hundred miles per hour. According to Henderson's testimony, officers pursued Appellant into a residential neighborhood before Appellant's vehicle collided with a street sign pole. Henderson further stated Appellant and his female passenger fled on foot, but were later apprehended. The jury also was able to view a video of the pursuit recorded by the dash camera of Henderson's patrol vehicle.

Moreover, at Appellant's punishment hearing, the State, without objection, introduced evidence of Appellant's prior convictions. The list of convictions spanned a sixteen year time period[3] and included crimes such as burglary of a habitation, assault-family violence, criminal trespass, possession of a controlled substance, evading arrest or detention, deadly conduct, assault causing bodily injury, manufacture or delivery of a controlled substance, and tampering with evidence.

[3] Some of these convictions are for conduct committed by Appellant while he was a juvenile.

Thus, the evidence before the jury permitted it not only to consider Henderson's account concerning Appellant's commission of the crime, but, by virtue of the video evidence, provided it a firsthand view of the extremely dangerous manner in which Appellant did so. Moreover, the jury was entitled to consider this litany of prior convictions for any purpose, including imposing a sentence at the higher end of the punishment range given Appellant's apparent propensity for committing felonies. *See* ***Delgado v. State***, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007) (once evidence is admitted without limiting instruction, it is part of general evidence and may be used for all purposes). We conclude that the state of the record strongly supports the jury's assessment of punishment toward the upper end of the punishment range.

Argument of Counsel

By and large, the prosecuting attorney's argument to the jury on the issue of punishment focused on the facts of the case, the State's burden of proof, and Appellant's prior convictions. However, shortly before concluding her argument, the prosecuting attorney stated to the jury, in pertinent part, as follows:

> In his 31 years, the longest time he's been out of trouble is four years. That's not very long. The other thing I want you to think about is he was paroled out on this 15 year sentence. Parole, a time when you're supposed to behave, be good, show what you're made of, follow the rules, dot your I's, cross your T's. Didn't happen. We know he had a violation and then he committed this offense that luckily didn't turn out to be deadly.
>
> You know, some other things I guess, and I'm going to be real short. Another thing is I want you to think about is, he's on a 15 year sentence out on parole. Anything 15 years or less, on this offense is a freebie. Because he's got 15 years, at least ten more years to serve. So it's a freebie. So think about that.

It is apparent that the prosecuting attorney was attempting to call the jury's attention to the potential effect of parole in the instant case in light of the range of punishment the jury was to consider by noting that Appellant previously received parole on a fifteen year sentence. Ordinarily, such a jury argument would support an inference that Appellant suffered some level of harm because the prosecuting attorney emphasized the charge error. *See* ***Roberson v. State***, 100 S.W.3d 36, 44 (Tex. App.–Waco 2002, pet. ref'd). However, in this case, the record indicates otherwise.

During its deliberation on the issue of punishment, the jury sent a note to the trial court asking it to "please clarify [the prosecuting attorney's] statement, that anything less than ten to [fifteen] years is a freebie." The trial court instructed the jury that the evidence was before it

and it was to continue its deliberations. Based on our reading of the jury's question, it is reasonable to conclude that the jury took note of the prosecuting attorney's statement that anything less than fifteen years is a "freebie[,]" but did not understand the underlying parole-related rationale for the statement. Accordingly, we conclude that the prosecuting attorney's statement concerning parole did not contribute to the jury's assessment of punishment.

Summation

Having considered the relevant factors and the record as a whole, we conclude that the error committed by the trial court did not affect the very basis of the case, deprive Appellant of a valuable right, or vitally affect a defensive theory. Therefore, we hold that Appellant did not suffer egregious harm. Appellant's sole issue is overruled.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered March 31, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 31, 2016

NO. 12-14-00263-CR

JEFFREY ARLEN QUINN,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 3rd District Court
of Henderson County, Texas (Tr.Ct.No. C-20,818)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.