Opinion filed September 21, 2017

In The

Eleventh Court of Appeals

No. 11-15-00241-CR

DANIEL MARRUJO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 32nd District Court
Nolan County, Texas
Trial Court Cause No. 11578-A

M E M O R A N D U M O P I N I O N

The jury convicted Daniel Marrujo of the second-degree felony offense of sexual assault of a child. Appellant pleaded "not true" to two prior felony convictions alleged for enhancement purposes. The jury found both enhancements to be true and assessed punishment at confinement for forty years in the Texas

Department of Criminal Justice. In a single issue, Appellant contends that the trial court erred in giving the jury an *Allen*[1] charge. We affirm.

Background Facts

The jury convicted Appellant of sexually assaulting M.C., his stepdaughter's fourteen-year-old friend. On the day of the alleged sexual assault, M.C. went to Appellant's house because his stepdaughter, O.G., was supposed to give M.C. a puppy for Valentine's Day. After Appellant began arguing with his wife, Frances Marrujo,[2] M.C. left the house on foot. M.C. testified that Appellant drove up beside her and asked her if she wanted a ride home. M.C. accepted, and Appellant took her by her house to drop the puppy off. They then went to a liquor store in Sweetwater. On their way back to Roby, Appellant told M.C. that she should stay with him.

M.C. testified that Appellant drove for a while and eventually stopped the car. Appellant began drinking and started making sexual remarks to M.C. They began driving again and ended up at a gas station in Roby. Appellant then drove M.C. back to Sweetwater, and they arrived at a motel. M.C. testified that, once inside the motel room, Appellant touched her and put his finger in her vagina. M.C. testified that Appellant told her not to tell his stepdaughter about what had happened. M.C. stated that she was later with O.G. at school and that she started to tell O.G. what Appellant had done to her but that O.G. "already knew."

Marrujo testified that she told Appellant to take M.C. home from their house. Appellant left with M.C., but he did not return home until the next day. Appellant told Marrujo that he spent the night at a cemetery.

Appellant voluntarily walked into the Fisher County Sheriff's Office in Roby and spoke with Deputy T.L. Shelton. Appellant told Deputy Shelton that M.C. was

[1]*See Allen v. United States*, 164 U.S. 492, 501 (1896).

[2]We will refer to Frances Marrujo as "Marrujo" in this opinion.

accusing him of sexually assaulting her. Appellant told Deputy Shelton that he took M.C. home at some point and that he stayed at the Budget Inn in Sweetwater by himself. The desk clerk from the Budget Inn stated that Appellant checked into the motel for one night for one guest; however, she said that the motel relies on guests to be honest and does not check for additional guests. After speaking with Appellant, Deputy Shelton interviewed M.C. at her school, and she stated that the alleged sexual assault occurred at a motel in Sweetwater. Upon discovering that the incident occurred in Sweetwater, Deputy Shelton turned the investigation over to Sam Cunningham, a detective with the Sweetwater Police Department.

Detective Cunningham interviewed Appellant. Appellant told Detective Cunningham that nothing happened between him and M.C. He stated that he had an argument with his wife and left his house to buy beer. He then went to a cemetery to spend the night but eventually ended up at the Budget Inn in Sweetwater by himself for the night. At first, Appellant told Detective Cunningham that he dropped M.C. off at her house before going to Sweetwater. However, after Detective Cunningham mentioned the possibility of a surveillance camera at the motel, Appellant stated that M.C. was in the area and was outside the motel but that he shut the door and went to sleep.

The jury began deliberating the issue of guilt/innocence at 10:59 a.m. At approximately 2:40 p.m., the jury sent out a note stating, "Through extensive deliberations on this case (No. 11,578-A), we the jury are unable to reach a unanimous decision of guilty or not guilty." Upon receiving the note, the trial court announced its intention to give the jury an *Allen* charge. The trial court provided a copy of the proposed charge to the attorneys and gave them an opportunity to review it. Appellant objected to the charge, asserting that the trial court's *Allen* charge did not include language stating that "no juror is required to give up a conscientiously held belief." Appellant further objected to the charge being read in general and

requested a mistrial. The trial court implicitly overruled Appellant's objections and gave the jury the following charge:

> LADIES AND GENTLEMEN OF THE JURY:
>
> You have expressed an apparent inability to reach a decision in this case as you have been charged to do. Consistent with my duty as judge, I cannot in good conscience discharge the jury at this time.
>
> This case has been ably tried and if, in the interest of justice, you can end it you should, otherwise, a new trial will be necessary. Absolute certainty cannot ever be obtained and there is no reason to believe any other jury could do any better or that the evidence on a new trial would be any clearer.
>
> As jurors you should not have any pride of opinion and should always keep an open mind while giving deference to the opinions of each other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong, but do not surrender your honest belief as to the weight and effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Retire at this time to the jury room to continue your deliberations.

After receiving this supplemental charge, the jury continued deliberating. The jury subsequently reached a verdict of guilty.

Analysis

In a single issue on appeal, Appellant contends that the trial court erred in giving the jury the *Allen* charge because the language of the charge and the attendant circumstances coerced the jury into reaching a verdict of guilty. Appellant contends that the charge given to the jury was "quite strong in favor of the jurors reaching a decision." He also asserts that the charge lacked strong enough language emphasizing to the jurors that they should "remain true to their conscience." Appellant further contends that the evidence in the case was not complex or lengthy.

As a result, he asserts that a unanimous jury would have reached a verdict quickly without being coerced by the *Allen* charge given by the trial court. We disagree.

"An *Allen* charge is a supplemental charge sometimes given to a jury that declares itself deadlocked." *Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006). The charge instructs a deadlocked jury to continue deliberating to reach a verdict if the jurors can conscientiously do so. *See id.* (The *Allen* charge "reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that a second jury would find the issue any easier to resolve."). Both the United States Supreme Court and the Texas Court of Criminal Appeals have sanctioned the use of an *Allen* charge. *See Allen*, 164 U.S. at 501–02; *Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535, 538 n.23 (Tex. Crim. App. 2014).

The primary inquiry when considering the propriety of an *Allen* charge is its "coercive effect" on juror deliberation in its context and under all circumstances. *Howard*, 941 S.W.2d at 123 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988)); *Freeman v. State*, 115 S.W.3d 183, 186–87 (Tex. App.—Texarkana 2003, pet. ref'd). An *Allen* charge that pressures jurors into reaching a particular verdict or improperly conveys the court's opinion of the case is unduly coercive. *West v. State*, 121 S.W.3d 95, 107–08 (Tex. App.—Fort Worth 2003, pet. ref'd). Conversely, a charge that speaks to the jury as a whole and encourages jurors to reexamine their views without surrendering honest convictions is not coercive on its face. *Freeman*, 115 S.W.3d at 187. To prevail on a complaint that an *Allen* charge is coercive, an appellant must show that jury coercion or misconduct likely occurred or occurred in fact. *West*, 121 S.W.3d at 107.

The *Allen* charge submitted by the trial court addressed the entire jury and instructed the jurors to continue deliberating without surrendering their views of the

case. Specifically, it instructed the jurors as follows: "[D]o not surrender your honest belief as to the weight and effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." The charge did not pressure jurors into reaching a particular verdict and did not convey the court's opinion of the case in any way. "[A] supplemental charge which suggests that *all* jurors reevaluate their opinions in the face of disparate viewpoints cannot be said to be coercive on its face." *Howard*, 941 S.W.2d at 123. Accordingly, the charge given by the trial court appeared to be designed to "avert an impasse" following a lengthy deliberation. *Id.* at 124. Accordingly, we conclude that the *Allen* charge was not coercive. Additionally, we conclude that the trial court did not err in giving the charge after the jurors had been deliberating for over three hours and sent out a note telling the trial court that they were deadlocked. To hold otherwise would require us to improperly speculate about the jurors' subjective thought processes. *See McQuarrie v. State*, 380 S.W.3d 145, 153 (Tex. Crim. App. 2012). We overrule Appellant's sole issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

September 21, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.