AFFIRM; and Opinion Filed January 21, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00720-CR

RAYMOND EDWARDS III, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1253451-W

MEMORANDUM OPINION

Before Justices Francis, Lang, and Brown
Opinion by Justice Brown

Raymond Edwards III appeals his jury conviction for aggravated sexual assault of a child. After finding appellant guilty, the jury assessed punishment at twenty-seven years' confinement. In two points of error, appellant contends (1) the trial court abused its discretion in admitting inadmissible hearsay, and (2) the punishment charge contained error. For the following reasons, we affirm appellant's conviction.

Appellant was indicted for the aggravated sexual assault of his eleven-year-old stepdaughter, M.K. The indictment alleged appellant committed the offense by causing the contact and penetration of M.K.'s anus with his sexual organ. *See* TEX. PEN. CODE ANN. 22.021(a)(1)(B)(i),(vi) (West 2011).

At the time of the offense, M.K. was living with appellant, her mother, and her four younger siblings. M.K. testified one morning before appellant went to work, he came in her

bedroom. M.K. was lying in bed and appellant "pulled [her] underwear to the side and stuck his private part in [her] bottom." M.K. said it was painful and she began to cry. Appellant told M.K. to keep it "between" them, and then left for work. When M.K.'s mother ("Mother") woke a few hours later, M.K. told her what happened.

Mother testified M.K. told her that morning that she was bleeding from her bottom. Mother thought M.K. had started her period, but M.K. said she had not and that appellant had done "something" to her. Mother "lost her mind" and went to appellant's workplace with a knife, wanting to kill him. When she found him, she began screaming. Police responded to the scene, and Mother told them that appellant had sexually assaulted her daughter.

Later that day, M.K. was interviewed at the Dallas Children's Advocacy Center and then examined by Dr. Matthew Cox at Children's Medical Center. Cox testified that M.K. told him her "dad" had stuck his "private part" in her bottom and that her bottom had bled. M.K. had an anal fissure, meaning tissues around her anus had been split. The anal fissure was recent and consistent with a penetrative injury. M.K.'s records from Children's Medical Center were admitted into evidence.

Meanwhile, police had arrested appellant for sexually assaulting M.K. In a videotaped interrogation, appellant first told police he went into M.K.'s room the night before to put the covers over her. However, after police told appellant that M.K. had given a detailed account of the offense and also had tears around her anus, appellant told police he had grabbed M.K. when he was trying to move the covers and his fingers accidently went inside her anus. Appellant denied touching M.K. with his penis.

In his first point of error, appellant contends the trial court erred in admitting the child's medical records without redacting inadmissible hearsay. The medical records contained an "Event History" that included a statement that "[Mother] described prior sexual encounters with

[appellant] where he wanted to have anal intercourse and she only did that twice." Appellant objected to that statement asserting it was hearsay and the State failed to show it fell within an exception to the hearsay rule. The trial court overruled his objection. On appeal, appellant asserts the trial court abused its discretion in admitting the medical records without redacting Mother's statement about their sexual encounters.

Even if we agreed that the statement was inadmissible, we do not agree the alleged error was reversible. We must disregard error in the admission of evidence if it did not affect the defendant's substantial rights. *See* TEX. R. APP. P. 44.2(b). Substantial rights are affected "when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005). In making this determination, we consider the entire record, including "any testimony or physical evidence admitted at trial, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence, the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire, and whether the State emphasized the error." *Easley v. State*, 424 S.W.3d 535, 542 (Tex. Crim. App. 2014)

The complained-of evidence consisted of a single sentence about appellant's sexual encounters with his wife. That sentence was contained within over twenty pages of medical records. According to appellant, Mother's statement was harmful because it showed "extraneous bad acts" and provided him with a "possible motive" to commit the offense in the manner the State alleged. In other words, appellant asserts the evidence showed he had a motive to engage in anal intercourse with his eleven-year-old stepdaughter because his wife would not engage in that conduct.

The State did not, however, rely on the statement at trial or assert it showed the motive appellant suggests. Instead, the State focused on the overwhelming evidence of appellant's guilt. That evidence included M.K.'s in-court testimony describing the offense, M.K.'s immediate outcry, and physical evidence showing M.K. had suffered a recent injury to her anus consistent with the assault she described. Furthermore, appellant admitted penetrating the child's anus, claiming he did so accidently and with his fingers. We conclude that in light of the record as a whole, appellant's substantial rights were not affected by the trial court's failure to redact Mother's statement about her sexual encounters with appellant.

In his second point of error, appellant complains of error in the punishment charge. At punishment, the State presented extraneous offense evidence that appellant physically assaulted Mother during their marriage. The trial court did not, however, instruct the jury that it could only consider that evidence if it was satisfied, beyond a reasonable doubt, that he committed those offenses. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (West 2006). The omission of the instruction constitutes charge error. *See Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). Appellant did not object to the charge. Therefore, we reverse only if the error was so egregious and created such harm that appellant did not have a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g).

Egregious harm is the type and degree of harm that affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defense theory. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). We must assess the degree of harm in the light of the entire record, including the jury charge as a whole, the state of the evidence, and the arguments of counsel. *See Marshall v. State*, PD-0509-14, slip op. at 5, 2016 WL 146450 (Tex. Crim. App. Jan. 13, 2016). To constitute egregious harm, the harm asserted must be actual, not just theoretical. *Young v. State*, 283 S.W.3d 854, 887 (Tex. Crim. App. 2009). The court of criminal

appeals has repeatedly explained the egregious harm standard is a difficult one to meet. *See Marshall*, PD-0509-14, slip op. at 5; *Hutch v. State*, 922 S.W.2d 166, (Tex. Crim. App. 1996). We conclude that standard has not been met here.

The extraneous offense evidence consisted of two domestic violence assaults, one in 2008 and another in 2011. Mother testified appellant committed both assaults and was arrested for them, but he was not prosecuted because she "dropped the charges." The State also presented the testimony of Sgt. Amanda Weatherford, one of the officers who responded to the scene of the 2011 assault. Weatherford testified to Mother's injuries, which were photographed. Those photographs were admitted into evidence.

Although appellant cross-examined both Mother and Weatherford, he did not do so with respect to whether the assaults had occurred. Instead, appellant elicited testimony from Mother that her fights with appellant "sometimes went both ways" and that Mother always took appellant back. Appellant also cross-examined Weatherford with respect to the seriousness of Mother's injuries. Appellant called his own mother as a witness and she acknowledged appellant had been arrested "at least twice" because of fights with Mother. Although she blamed Mother for starting fights with appellant, she did not deny appellant assaulted Mother. On the other hand, she did testify that appellant was not violent with the children.

According to appellant, he suffered egregious harm because the State relied on the extraneous offenses at punishment and, in the absence of an instruction, it was "probable that the jury might not have held the State to a high enough burden and accepted the evidence without evaluating it thoroughly."

The question presented is whether omission of the reasonable doubt instruction, not admission of the evidence, resulted in egregious harm. *See Ellison v. State*, 86 S.W.3d 226, 228 (Tex. Crim. App. 2002). Mother testified positively and unequivocally that appellant committed

the offenses. Her testimony regarding the second and more recent offense was corroborated by Sgt. Weatherford and photographs of Mother's injuries. Appellant did not challenge the State's evidence other than to question the severity of those injuries. Although the jury charge did not instruct the jury on the reasonable doubt standard, the charge did instruct the jury that it was the exclusive judge of the facts proved and the credibility of the witnesses. The jury was thus informed it was not required to consider the extraneous offenses if it did not believe they occurred. Under these circumstances, it is unlikely omission of the reasonable doubt instruction impacted the manner in which the jury reviewed the extraneous offense evidence.[1] *See Brown v. State*, 45 S.W.3d 228 (Tex. App.—Fort Worth 2001, pet. ref'd) (no egregious harm when appellant sufficiently linked to extraneous offenses); *Coleman v. State*, 979 S.W.2d 438, 444 (Tex. App.—Waco 1998, no pet.) (no egregious harm when record failed to show jury would have considered the extraneous offenses differently if the burden-of-proof instruction had been included in the charge); *Ellison v. State*, 97 S.W.3d 698, 701 (Tex. App.—Texarkana 2003, no pet.) (failure to give instruction harmful when appellant vigorously argued to jury that it was unreasonable to believe he had engaged in highly inflammatory extraneous misconduct). Additionally, the sentence the jury assessed does not reflect appellant was harmed by omission of the instruction. The range of punishment for the offense was five years to ninety-nine years or life. *See* TEX. PENAL CODE ANN. § 12.32 (West 2011). Mother testified that appellant should be sentenced to at least seventy-five years and the State suggested the jury go with Mother's instinct. Appellant, on the other hand, stated he did not know what was appropriate, but suggested that the jury consider basing appellant's punishment on when M.K. or appellant's youngest child would turn twenty one, seven years or seventeen years, respectively.

[1] Based on the strength of the extraneous offense evidence, appellant may well have made a strategic decision not to object to the charge to avoid the "thorough examination" of the extraneous evidence he now complains he was denied.

The jury assessed punishment at twenty-seven years' confinement, significantly closer to the punishment appellant conceded might be appropriate than what the State asserted was justified and well below the ninety-nine-year maximum term available for the offense. The sentence was supported by the egregious facts of the offense alone, an aggravated sexual assault in which appellant engaged in anal intercourse with his wife's eleven-year-old daughter. *See Batiste v. State*, 73 S.W.3d 402, 408 (Tex. App.—Dallas 2002, no pet.).

Having reviewed the entire record, we conclude appellant did not suffer egregious harm from the trial court's omission of the reasonable doubt instruction in the punishment charge. Accordingly, we overrule appellant's second point of error and affirm his conviction.

/Ada Brown/
ADA BROWN
JUSTICE

140720F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RAYMOND EDWARDS III, Appellant	On Appeal from the 363rd Judicial District Court, Dallas County, Texas
No. 05-14-00720-CR V.	Trial Court Cause No. F-1253451-W.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Brown. Justices Francis and Lang participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 21st day of January, 2016.