Affirmed; Opinion Filed May 5, 2016.

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-15-00430-CR

NORMAN AGENT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-1361473-H

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Bridges, and Justice Evans
Opinion by Justice Evans

Norman Agent appeals his conviction for the offense of continuous sexual abuse of a child. In his sole issue, appellant contends that he was egregiously harmed when the trial court failed to provide a limiting instruction regarding extraneous offenses during the punishment phase of the trial. Appellant seeks a reversal and remand for further proceedings. We affirm.

BACKGROUND

In December 2013, appellant was indicted for the offense of continuous sexual abuse of a young child. Appellant pleaded not guilty and the trial commenced on March 23, 2015.

During trial, the complainant, A.N., testified that appellant used to date her mother. During the third grade, A.N. moved to Oklahoma with appellant, her mother, two sisters and brother. A.N. testified that appellant told her to get on the bathroom sink and take down her

pants and then "he put his middle part in me." A.N. later clarified that she meant that appellant put his penis in her vagina. After the family moved back to Texas, appellant's abuse of A.N. continued. A.N. testified that while the family was living at her grandmother's house, appellant again instructed her to go into the bathroom and hold her pants. Appellant then put his finger in A.N.'s vagina. A.N. testified that appellant also put his fingers in her vagina early one morning in his bedroom after her mother had gone to work. Appellant also inserted his finger into A.N.'s vagina after the family moved to an apartment in Plano.

A.N. further testified that appellant got mad at her for drawing after they had cleaned up and whipped her. After this incident, A.N.'s older sister, X.N., came into A.N.'s room and they began talking. A.N. told X.N. that appellant had been abusing her. X.N. got mad and called their mother at work. Their mother came home and A.N. told her what had happened while appellant listened as well. That night, A.N. and X.N. went to stay at their grandmother's house. However, the family–including appellant–moved out of the apartment and into appellant's sister's house. A.N.'s mother did not discuss the abuse with A.N. again and did not leave appellant. At some point, A.N. mentioned the abuse to a teacher and a counselor at school.

X.N. first testified outside the presence of the jury and stated that appellant had sexually touched her. X.N. stated that it first happened when she was twelve or thirteen at an apartment in Dallas. Appellant touched X.N.'s vagina with his hand. X.N. further testified that appellant also touched her with his penis. Appellant also wanted X.N. to sell drugs at her school to make money for the family. After X.N.'s testimony, the trial court asked if there was any argument about the admissibility of the statement or X.N.'s testimony. After hearing from the State and appellant's counsel, the trial court ruled that X.N.'s testimony was adequate to support a finding by the jury that the appellant committed the separate offenses beyond a reasonable doubt and allowed X.N.'s testimony to take place before the jury.

X.N. then testified before the jury.[1] X.N. testified that appellant first touched her when she was in the seventh grade and appellant touched her vagina with his hands. In another incident, appellant brought X.N. into his bedroom and began touching himself on his penis while the family was living at an apartment in Plano. Appellant then began touching X.N. under her clothes and he tried to put his penis in her vagina. X.N. testified that he was able to touch her vagina with his penis and she tried to push him off and got up.

One night after appellant had punished A.N., X.N. went to talk to A.N. X.N. told A.N. that appellant had touched her. A.N. started crying and told X.N. that appellant had touched her too. X.N. then called her mother to tell her about the abuse. A.N. and X.N.'s mother chose to continue her relationship with appellant. A few weeks later A.N. spoke with her elementary school counselor, Shakira Easley. Easley testified that A.N. told her about the abuse and Easley called Child Protective Services (CPS). The next day two CPS agents came to school to speak with A.N. and took her to the Dallas Children's Advocacy Center.

Nakisha Biglow, a forensic interviewer for Dallas Children's Advocacy Center, testified that she conducted A.N.'s forensic interview. A.N. was able to provide details of the abuse and identify appellant as her abuser during the interview. A.N. described three instances of abuse to Biglow but also stated that it would happen about once a week from the time she was eight to ten.

Brenda Crawford, a sexual assault nurse examiner at Cook Children's Medical Center, testified that that she examined and obtained A.N.'s personal history. In the patient history section, Crawford wrote down what A.N. told her: "My step-dad told me to come here the 1st time & he pulled my pants down & he put his penis in me. It kept on going [sic]. I was 9 when

[1] Appellant did not object to X.N.'s testimony during trial.

it started & it kept going until Sept 2013." A.N. identified her stepdad as appellant. A.N. also told Crawford that appellant said, "if you tell anybody, I'm going to whoop you."

Alicia Brown, a detective formerly with the Dallas Police Department Child Abuse Unit, interviewed appellant. Detective Brown testified that she read appellant his Miranda warnings and he signed the Miranda card and agreed to speak with her. Emilio Henry, a detective with the Dallas Police Department Child Abuse Unit, also interviewed appellant. Detective Henry testified that appellant both denied the sexual abuse allegations and also that he "had made a mistake" and his "penis went in her vagina." At some point during the interview, Detective Henry left to get appellant a piece of paper on which to write his statement. Detective Henry returned with a form called a voluntary statement which contains a paragraph with the Miranda rights. Detective Henry read appellant his Miranda rights again and read through the form with appellant. Appellant signed his voluntary statement and wrote as follows: "I touched [A.N.] with my penis into her vagina. I put my finger in her vagina." The DVD of appellant's interview was admitted into evidence.

Appellant testified during the guilt-innocence phase of the trial and denied the allegations by A.N. and X.N. He also testified that he signed the voluntary statement to prevent the children from being taken away by CPS.

At the conclusion of the trial, the trial court tendered the proposed jury charge to the attorneys. Appellant's counsel requested an instruction that the jury could not consider X.N.'s testimony as to appellant's guilt in this case. The trial court responded that appellant should have asked for a limiting instruction at the time the testimony was admitted and overruled the objection. On March 27, 2015, the jury convicted appellant of continuous sexual abuse of a child under fourteen years of age.

During the punishment phase of the trial, the State resubmitted its case-in-chief in the trial and rested. After appellant and appellant's mother testified for the defense, the trial court took a five minute recess and asked counsel if they had any objections to the proposed punishment charge. The jury charge regarding punishment did not contain a burden of proof instruction concerning the extraneous offenses introduced during the guilt/innocence phase of the trial and resubmitted during the punishment phase. Appellant's counsel stated that it had no objections other than those previously made to the other charge.[2] The trial court then read the charge regarding punishment. The jury sentenced appellant to thirty-seven years of imprisonment.

ANALYSIS

Appellant contends that the trial court erred by failing to give a limiting instruction regarding the burden of proof for appellant's extraneous offenses during the punishment phase of the trial. At trial, appellant did not object that the jury charge lacked a reasonable doubt instruction, but on appeal he argues that he was egregiously harmed by error in the charge. We disagree.

When we review claims of jury charge errors, we first decide whether there was error in the charge. *Ferguson v. State*, 335 S.W.3d 676, 684 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Here, the State resubmitted its case-in-chief—which included evidence of two unadjudicated sexual assaults committed by appellant against X.N.—during the punishment phase and rested. The trial court did not instruct the jury regarding the burden of proof applicable to the two extraneous offenses. Appellant did not request such instruction or object to

[2] Appellant previously objected that the charge should include an instruction that the jury could not consider X.N.'s testimony as to appellant's guilt in this case. Appellant did not, however, object that either the guilt/innocence charge or the punishment charge lacked an instruction that extraneous offenses must be proven beyond a reasonable doubt before the jury can consider them.

its omission from the charge. As courts have previously held, however, appellant was not required to make an objection or request in order for the trial court to instruct the jury. *See Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000) ("While section 3(a) [of article 37.07 of the Code of Criminal Procedure] says nothing about the submission of a jury instruction to this effect, such instruction is logically required if the jury is to consider the extraneous-offense and bad act evidence under the statutorily prescribed reasonable-doubt standard."). The trial court erred in failing to instruct the jury on the reasonable doubt standard *sua sponte*. *See Zarco v. State*, 210 S.W.3d 816, 821 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Thus, the trial court's charge was erroneous.

If there was error and appellant objected to the error at trial, then only "some harm" is necessary to reverse the trial court's judgment. *See Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).[3] If, however, the appellant failed to object at trial—as in this case—then the appellant will obtain a reversal "only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Id.* 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). In making an egregious harm determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information [revealed] by the record of the trial as a whole." *Trejo v. State,* 280 S.W.3d 258, 261 (Tex. Crim. App. 2009) (quoting *Almanza*, 686 S.W.2d at 171). Egregious harm is a difficult

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[3] The *Huizar* case also concludes that the failure of the trial court to instruct the jury on extraneous offenses during the punishment phase was purely a charge error under article 36.19 and *Almanza* provides the appropriate harm analysis. *Huizar*, 12 S.W.3d at 484-85 ("The error in this case derives from statutory violations of articles 36.14 and 37.07, and is purely 'charge error' under article 36.19. *Almanza* sets forth the appropriate harm analysis for charge error under article 36.19.").

standard to meet and must be determined on a case-by-case basis. *See Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002).

The first *Almanza* factor requires consideration of the entire jury charge. *See Almanza*, 686 S.W.2d at 171. The jury charge regarding punishment contained a statement that the jury could "take into consideration all of the facts shown by the evidence admitted before you in the full trial of this case and the law as submitted to you in this charge." The charge, however, failed to contain an instruction to the jury that it could not consider evidence of appellant's extraneous offenses unless such had been proven beyond a reasonable doubt. Accordingly, this factor does weigh in favor of egregious harm.[4]

The second *Almanza* factor involves the state of the evidence, including the contested issues and weight of the probative evidence. *See Almanza*, 686 S.W.2d at 171. In examining whether egregious harm occurred from the failure to include the burden of proof instruction for unadjudicated extraneous offenses, we consider whether the evidence was clear, strong, direct and unimpeached. *Martinez v. State*, 313 S.W.3d 358, 367 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). In this case, A.N. testified in detail about four separate instances of appellant's abuse. Her testimony was clear, strong, direct and unimpeached. A.N. was able to provide details of the abuse and identify appellant as her abuser to Biglow during the forensic interview. A.N. described three instances of abuse to Biglow which was consistent with A.N.'s testimony in court. In addition, Crawford reiterated that A.N. identified appellant as her abuser. A.N. also told Crawford about the first time he abused her when she was nine and that it continued until September 2013. Finally, appellant admitting to putting his finger and penis in A.N.'s vagina in his voluntary statement. In regard to the extraneous offenses, X.N.'s testimony was also clear,

[4] In its brief, the State concedes that "lacking any burden language, if this factor weighs in favor of egregious harm, it does so slightly."

strong, direct and unimpeached. X.N. testified about two separate instances of abuse by appellant which was consistent with the abuse described by A.N. *See Zarco*, 210 S.W.3d at 825-26 (complaining witness's testimony of the charged offense and the extraneous offenses was equally strong, direct, and consistent which aided the court in finding no harm in the lack of an appropriate jury instruction because all of the testimony was reasonable and "was of such a character that a reasonable mind could believe it beyond a reasonable doubt."). The only evidence challenging the State's version of the charged offenses and the extraneous offenses was appellant's own testimony. In both the guilt/innocence and the punishment phases, appellant denied abusing A.N. or X.N. The jury, as the trier of fact, was free to believe the complaining witness's testimony over appellant's testimony. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999) ("The jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence."). In light of the evidence of appellant's guilt for continuous sexual assault in this case, which involves repeated assaults on a child and appellant's admission to such acts, the evidence concerning the extraneous offenses does not make the case for punishment clearly more persuasive. Thus, we conclude that evidence presented by the State of extraneous offenses, in light of appellant's admission to having committed the charged offenses and the jury's acceptance of the State's version of the events when it found appellant guilty of continuous sexual abuse, weighs against a finding of egregious harm.

The third *Almanza* factor involves the argument of counsel. *See Almanza*, 686 S.W.2d at 171. During its closing argument regarding guilt or innocence, the State did not raise X.N.'s testimony. Appellant's counsel, however, did raise X.N.'s testimony:

> Now, one of the things that you heard about or some of the things that you heard about was [X.N.'s] testimony. You remember that? Right here in the second paragraph, this is what the State has to prove. This is what they have to prove. And they -- and in no place in here does it say anything about [X.N.'s] testimony. While that was admitted, it's not what he's charged with, and it doesn't have anything to do with the case that we're here about today. Now, I know it's going

> to be hard to separate your mind going, [w]ell, I heard all that stuff and, sure, I'm going to think about it. Well, you're not supposed to because it's not set out in the charge.

Thus, appellant's counsel told the jury that the State had the burden to prove the allegations against appellant and that he was not charged with events described by X.N. In its rebuttal argument, the State addressed X.N.'s testimony as follows:

> And the sister, [X.N.], what does she think? She immediately knows that it's true. She's immediately angry and upset. Why? Because he has done the same thing to her. He's not charged with what happened to [X.N.], but you can use that information to corroborate what [A.N.] has told you, to corroborate the things that he did to [A.N.] in this case.

As such, the State only referenced X.N.'s testimony to corroborate the abuse described by A.N.[5]

During its closing argument regarding punishment, the State told the jury they could "punish the child molester who abused multiple children." Appellant's counsel did not refer to X.N.'s testimony during this closing. In its rebuttal, the State noted that appellant had "sexually abused not one, but two different girls" and that "you can't quantify what happened to [A.N.], what happened to [X.N.]." The State, however, did not rely solely on the extraneous offense evidence nor did it argue for the maximum sentence of ninety-nine years. Instead, the State told the jury that it was "not going to ask for a life sentence" or even "ask for a number to put him away" because that was up to the jury. The State itself informed the jury that appellant was not charged with the abuse of X. N. and that her testimony should only be used to corroborate A.N.'s testimony. Accordingly, we conclude that the arguments of counsel, in light of the evidence, the jury's acceptance of the State's version of events in finding appellant guilty of continuous sexual assault, and the failure by appellant to mount "any serious challenge to the existence of the

[5] For example, the State also stated during its rebuttal: "You know what happened in this case. You know because [A.N.] told you. [X.N.] confirmed it."

unadjudicated extraneous offenses, weighs against a finding of egregious harm. *See Martinez,* 313 S.W.3d at 369.

The final *Almanza* factor addresses any other relevant information revealed by the record of the trial as a whole. *See Almanza*, 686 S.W.2d at 171. Here, the State raised two points as "other relevant information": (1) jury questions submitted to the trial court; and (2) severity of punishment assessed. The only question submitted by the jury during deliberations related to whether appellant would have to register as a sex offender upon release from prison and what type of monitoring, if any, would be required applicable to appellant. The fact that the jury did not raise any questions about the extraneous offenses or X.N.'s testimony also supports the conclusion that appellant was not egregiously harmed by the omission of a reasonable doubt instruction. *See Render v. State*, 316 S.W.3d 846, 854 (Tex. App.—Dallas 2010, pet. ref'd) (court reviewed jury notes as part of Almanza analysis to determine egregious harm).

Also, the punishment range for appellant was twenty-five years to ninety-nine years. In this case, the jury sentenced appellant to thirty-seven years of imprisonment. Appellant argues that appellant was egregiously harmed because the jury imposed a sentence twelve years above the minimum. The jury's sentence, however, was also sixty-two years below the maximum. As the prison sentence was on the lower end of the punishment range, we cannot conclude that appellant suffered egregious harm. *See Jones v. State*, 111 S.W.3d 600, 610 (Tex. App.—Dallas 2003, pet. ref'd) (holding that defendant did not suffer egregious harm when trial court failed to give reasonable doubt instruction *sua sponte* during sentencing for extraneous offenses because, in part, jury "assessed punishment far below the maximum punishment available."). For all these reasons, the fourth factor weighs against a finding of egregious harm.

Thus, in light of the *Almanza* factors, we are unable to conclude that appellant suffered egregious harm and we overrule appellant's sole issue.

III. CONCLUSION

We resolve appellant's issue against him and affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NORMAN AGENT, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-15-00430-CR V.	Trial Court Cause No. F-1361473-H. Opinion delivered by Justice Evans.
THE STATE OF TEXAS, Appellee	Chief Justice Wright and Justice Bridges participating.

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

Judgment entered this 5th day of May, 2016.