AFFIRM; and Opinion Filed May 31, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00794-CR

JORGE BARROQUIN-TABARES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1353472-V

MEMORANDUM OPINION

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

Following a jury trial, appellant Jorge Barroquin-Tabares appeals his conviction for continuous sexual abuse of a young child. In five issues, he contends section 21.02 of the penal code is unconstitutional, complains of alleged jury charge error, and challenges his sentence. For reasons that follow, we affirm the trial court's judgment.

BACKGROUND

Appellant was indicted for the offense of continuous sexual abuse of Y.M., a child younger than fourteen years of age. Appellant was married to Y.M.'s maternal aunt. Y.M.'s family and appellant's family lived in the same house. The indictment in this case alleged appellant intentionally or knowingly, during a period that was thirty or more days in duration, committed two or more acts of sexual abuse against Y.M. by the contact and penetration of Y.M.'s female sexual organ by appellant's sexual organ, by contact between Y.M.'s mouth and

appellant's sexual organ, and by contact between appellant's hand and Y.M.'s genitals with the intent to arouse and gratify appellant's sexual desire. Y.M., age seventeen at the time of trial, testified about various acts of sexual abuse appellant committed against her that began when she was nine and continued until she was thirteen. Y.M. eventually told two of her friends about the abuse and then told her mother. The court charged the jury on the lesser included offenses of aggravated sexual assault and indecency with a child. The jury found appellant guilty of continuous sexual abuse and assessed his punishment at forty-two years' confinement and a $9,000 fine. This appeal followed.

CONSTITUTIONALITY OF SECTION 21.02

In his first issue, appellant contends section 21.02 of the penal code is unconstitutional because it authorizes a non-unanimous verdict. Under section 21.02, a person commits the offense of continuous sexual abuse of a young child if, among other things, during a period that is thirty or more days in duration, he commits two or more acts of sexual abuse. *See* TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2015). An "act of sexual abuse" means any act that is a violation of various penal laws, including indecency with a child and aggravated sexual assault. *Id.* § 21.02(c). The statute provides that members of the jury 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. *Id.* § 21.02(d). The court's charge in this case instructed the jury in accordance with section 21.02(d).

Appellant challenges the constitutionality of section 21.02, arguing the specific acts of sexual abuse are elements of the offense on which the jury must unanimously agree. He did not, however, raise this complaint to the trial court and thus has not preserved it for our review. *See* TEX. R. APP. P. 33.1(a); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (defendant may not raise facial challenge to constitutionality of statute for first time on appeal).

Even if appellant had preserved error, this Court and other intermediate appellate courts have already rejected his argument. In *Render v. State*, we concluded section 21.02 did not violate the constitutional right to a unanimous jury verdict, holding that the statute creates a single element of a "series" of acts of sexual abuse. 316 S.W.3d 846, 856–58 (Tex. App.—Dallas 2010, pet. ref'd); *see also Pollock v. State*, 405 S.W.3d 396, 405 (Tex. App.—Fort Worth 2013, no pet.); *Fulmer v. State*, 401 S.W.3d 305, 313 (Tex. App.—San Antonio 2013, pet. ref'd); *McMillian v. State*, 388 S.W.3d 866, 872–73 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Jacobsen v. State*, 325 S.W.3d 733, 739 (Tex. App.—Austin 2010, no pet.). Appellant acknowledges this case law, but urges that *Render* and similar cases are wrongly decided. We decline to revisit our holding in *Render*. We overrule appellant's first issue.

ALLEGATIONS OF ERROR IN JURY CHARGE ON GUILT/INNOCENCE

In his second issue, appellant contends the trial court erred in the jury charge by incorrectly defining indecency with a child. In the abstract portion of the charge, the court instructed the jury that indecency with a child "is committed if . . . he engages in sexual contact with the child or causes the child to engage in sexual contact . . . ." Sexual contact was defined as "any touching of the anus, breast, or any part of the genitals of another person . . . ." *See* TEX. PENAL CODE ANN. § 21.01(2) (West 2011). For indecency with a child to amount to an act of sexual abuse under the statutory definition of continuous sexual abuse of a child, however, the sexual contact must be touching of either the anus or genitals, not the breast. *See id.* § 21.02(c)(2). Appellant contends it was error to include touching of the breast in the definition in the charge.

In analyzing an allegation of jury-charge error, we first decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we conclude there was error, we then conduct a harm analysis. *Id.* A defendant's failure to preserve charge error does not become an

issue until we conduct a harm analysis. The degree of harm necessary for a reversal depends on whether the defendant objected to the error. *Id.* If a defendant properly objected to the charge, reversal is required if we find "some harm." *Id.* If no objection was made, we will not reverse unless the record shows "egregious harm." *Id.* at 743–44. Egregious harm is harm that deprives a defendant of a fair and impartial trial. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). For both preserved and unpreserved charge error, the actual degree of harm must be analyzed 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. *Patrick v. State*, 906 S.W.2d 481, 492 (Tex. Crim. App. 1995) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)).

The State asserts that no error occurred because the definition of sexual contact was not incorrect. Because the lesser included offense of indecency with a child was submitted to the jury, the court was required to give the complete definition of sexual contact. The State does acknowledge that "perhaps the better practice would have been to give separate definitions by explaining that 'sexual contact' with respect to continuous sexual abuse means X, but with respect to indecency with a child it means Y." We will assume, without deciding, that the charge was erroneous.

Appellant did not object to the charge and thus must show egregious harm to be entitled to a reversal. The court of criminal appeals has stated that an error in the abstract instruction is not egregious where the application paragraph correctly instructs the jury. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999). The application paragraph is what explains to the jury, in concrete terms, how to apply the law to the facts of the case. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013). The application paragraph in this case did not mention sexual contact with Y.M.'s breast. It properly directed the jury that it should find

appellant guilty of continuous sexual abuse of a young child if it found he intentionally or knowingly committed two or more acts of sexual abuse against Y.M., namely "by the contact of the complainant's female sexual organ by the defendant's sexual organ, or by contact between the mouth of the complainant and the sexual organ of the defendant, or by the contact between the hand of the defendant and the genitals of the complainant. . . ." *See Bolen v. State*, 478 S.W.3d 865, 868 (Tex. App.—Amarillo 2015, pet. ref'd) (where application paragraph properly directed jury to acts of sexual abuse authorized by indictment, no egregious harm resulted from definition of sexual contact that referenced acts not contained in indictment). Further, viewing the charge as a whole, the abstract definition of "act of sexual abuse" worked in appellant's favor. The definition limited acts of sexual abuse to the offense of aggravated sexual assault and did not mention the relevant forms of indecency with a child.

The other *Almanza* factors also weigh in favor of finding no egregious harm. In considering the state of the evidence, we note that Y.M. described one time when appellant touched her breasts in a parked car when she was eleven, but testified about numerous times when he contacted her female sexual organ or her mouth with his sexual organ. The defense did not call any witnesses. Its theory of the case was that there was reasonable doubt because there was no objective evidence to corroborate Y.M.'s testimony. The defense also argued that Y.M. made the allegations because her parents did not like her boyfriend. Also, in closing argument, the State did not argue that appellant's touching of Y.M.'s breast was an act of sexual abuse. The prosecutor urged the jury to find appellant guilty of continuous sexual abuse because of Y.M.'s testimony appellant put his hand on her genitals, put his penis inside her vagina, and put her mouth on his penis. We have reviewed the record and find no additional relevant information. We conclude any error in the definition of sexual contact as it related to continuous sexual abuse did not cause appellant egregious harm. We overrule appellant's second issue.

In his third issue, appellant asserts the trial court erred by including a definition of reasonable doubt in the jury charge. He complains of the following instruction: "It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all 'reasonable doubt' concerning the defendant's guilt." Appellant maintains that, under *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000), this instruction was an impermissible definition of reasonable doubt.

Since 2003, we have rejected appellant's argument in cases involving this exact instruction. *O'Canas v. State*, 140 S.W.3d 695, 699–702 (Tex. App.—Dallas 2003, pet. ref'd) (instruction in question does not define reasonable doubt; it states legally correct proposition that prosecution's burden is to establish proof beyond a reasonable doubt and not beyond all possible doubt); *see Washington v. State*, No. 05-14-00604-CR, 2015 WL 4178345, at *7 (Tex. App.—Dallas July 10, 2015, no pet.) (not designated for publication); *Bates v. State*, 164 S.W.3d 928, 931 (Tex. App.—Dallas 2005, no pet.). Further, the court of criminal appeals has held that a trial court does not abuse its discretion in giving the complained-of instruction. *Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010); *Woods v. State*, 152 S.W.3d 105, 115 (Tex. Crim. App. 2004). We overrule appellant's third issue.

APPELLANT'S CHALLENGES TO HIS SENTENCE

In his fourth issue, appellant contends the Eighth Amendment categorically bars his sentence in this case. Appellant was sentenced to forty-two years' confinement for continuous sexual abuse of a young child. A person serving a sentence for continuous sexual abuse of a young child is not eligible for parole. *See* TEX. GOV'T CODE ANN. § 508.145(a) (West Supp. 2015). Appellant argues that because someone convicted of a child's murder could receive a forty-two-year sentence *with* the possibility of parole, *see id.* § 508.145(f), his forty-two-year

sentence for continuous sexual abuse of a child *without* the possibility of parole is disproportionate to the crime.

Appellant has not preserved this issue for appellate review because he did not raise this complaint in the trial court. *See* TEX. R. APP. P. 33.1(a). A defendant may forfeit the right to complain of an alleged constitutional violation, including the right to be free from cruel and unusual punishment, by failing to object. *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). Appellant did not object when his sentence was imposed or raise the issue in a motion for new trial.

Even if appellant had preserved error, his complaint lacks merit. Two of our sister courts have considered this issue and rejected the argument appellant makes. *See DeLeon v. State*, No. 03-13-00202-CR, 2015 WL 3454101, at *9 (Tex. App.—Austin May 29, 2015, pet. ref'd) (mem. op., not designated for publication); *Glover v. State*, 406 S.W.3d 343, 347–50 (Tex. App.—Amarillo 2013, pet. ref'd). In analyzing a similar categorical challenge to the statutory punishment scheme for continuous sexual abuse, the *Glover* court considered 1) whether there is a national consensus against imposing the punishment for the offense; 2) the moral culpability of the offenders at issue in light of their crimes and characteristics; 3) the severity of the punishment; and 4) whether the punishment serves legitimate penological goals. *Glover*, 406 S.W.3d at 348 (citing *Meadoux v. State*, 325 S.W.3d 189, 194 (Tex. Crim. App. 2010)). After examining these factors, the court concluded that the sentencing scheme that categorically denies the availability of parole to those who commit continuous sexual abuse of a young child does not violate the Eighth Amendment. *Id.* at 350. We agree that the categorical ban on the availability of parole for a person convicted of continuous sexual abuse of a young child does not violate the Eighth Amendment. *See DeLeon*, 2015 WL 3454101, at *9 (court was not persuaded that mere

fact that child sexual abuser might be sentenced to longer prison term than child murderer necessarily renders sentencing scheme unconstitutional); s*ee also Fulmer*, 401 S.W.3d at 314 (rejecting equal protection challenge to section 508.145(a) because legislature could have rationally concluded persons convicted of continuous sexual abuse are particularly dangerous and should be singled out for parole ineligibility). We overrule appellant's fourth issue.

In his fifth issue, appellant argues that the trial court erred in permitting the jury to assess a fine in the punishment charge. He contends the $9,000 fine was impermissible because section 21.02 of the penal code does not authorize a fine. We disagree.

The offense of continuous sexual abuse of a young child is a first degree felony. TEX. PENAL CODE ANN. § 21.02(h). Section 12.32 of the penal code sets out the punishment for first degree felonies in general. Section 12.32(a) provides a punishment range of life imprisonment or any term of not more than ninety-nine years or less than five years. TEX. PENAL CODE ANN. § 12.32(a). Section 12.32(b) provides that in addition to imprisonment, an individual adjudged guilty of a first degree felony may be punished by a fine not to exceed $10,000. *Id.* § 12.32(b). Section 21.02(h) of the penal code provides, however, that the offense of continuous sexual abuse is punishable by imprisonment for life or any term of not more than ninety-nine years or less than twenty-five years. *Id.* Thus, by section 21.02(h), the legislature has imposed a greater minimum punishment for people who commit the first degree felony of continuous sexual abuse than for people who commit other first degree felonies. Section 21.02(h) should be read in conjunction with section 12.32, which provides for an optional fine of up to $10,000 for a person adjudged guilty of a first degree felony. *See Haywood v. State*, 344 S.W.3d 454, 465 (Tex. App.—Dallas 2011, pet. ref'd) (laws pertaining to same subject should be construed in conjunction with each other and harmonized as a whole); *see also* TEX. GOV'T CODE ANN. § 311.026(a) (West 2013) (if general provision conflicts with special provision, provisions shall be

construed if possible so that effect is given to both). The $9,000 fine in this case was authorized by section 12.32(b). We overrule appellant's fifth issue.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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TEX. R. APP. P. 47.2(b).

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JORGE BARROQUIN-TABARES,
Appellant

No. 05-15-00794-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1353472-V.
Opinion delivered by Justice Brown, Justices Lang and Whitehill participating.

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

Judgment entered this 31st day of May, 2016.