Affirmed and Opinion Filed May 31, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00233-CR

CLAUDIUS GLEN HALLIDAY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-82679-2014

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Bridges

A jury convicted appellant Claudius Glen Halliday of aggravated sexual assault of a child and two counts of indecency with a child by contact. The jury sentenced him to fifteen years' imprisonment for the aggravated sexual assault and six years' imprisonment on each indecency offense. On appeal, he argues the trial court erred by not forcing the State to elect between the incidents it sought to rely on for conviction and by sua sponte including a lesser-included offense in the charge. We affirm.

The facts are well-known to the parties. Because appellant has not raised a sufficiency challenge, we include only those facts relevant for disposition of this appeal. TEX. R. APP. P. 47.1.

In his first two issues, appellant argues the trial court erred because it did not require the State to elect between two counts in the indictment alleging appellant touched complainant's

breast. The only difference in the two counts were the dates they allegedly occurred.[1] The State responds appellant's complaint on appeal does not comport with his objection to the trial court; therefore, his issue is waived. Alternatively, the State argues the trial court did not err because it was not required to elect between two properly joined counts and error, if any, was harmless.

To preserve an issue for appellate review, a defendant must raise his complaint to the trial court in the form of an objection, request, or motion for new trial. TEX. R. APP. P. 33.1. Although a party need not employ specific words, "a general or imprecise objection will not preserve error for appeal unless the legal basis for the objection is *obvious* to the court and to opposing counsel." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016). A defendant must let the trial court know what he wants and why he feels entitled to it clearly enough for the judge to understand him and at a time when the trial judge is in the position to do something about it. *Id*.

Here, at the conclusion of the State's evidence and outside the presence of the jury, defense counsel read counts II and III and then stated, "So those are exactly the same count. The only difference between them is the dates on the 'on or about.'" He continued, "So do they find him guilty on both counts, or do they just find him guilty on which count, and if so, which of the two counts do they find him guilty on?" The court acknowledged counsel's concern: "So what you're

[1] The indictment reads, in part, as follows:

> [I]t is further presented in and to said court that the said defendant on or about the 20th day of November, 2013, in Collin County, Texas, did then and there
>
> COUNT II
>
> Intentionally and knowingly, with the intent to arouse and gratify the sexual desire of any person, engage in sexual contact by touching the breast of [complainant], a child younger than seventeen (17) years of age and not the spouse of defendant, by means of defendant's hand;
>
> And it is further presented in and to said court that the said defendant on or about the 1st day of January, 2010 in Collin County, Texas, did then and there
>
> COUNT III
>
> Intentionally and knowingly, with the intent to arouse and gratify the sexual desire of any person, engage in sexual contact by touching the breast of [complainant], a child younger than seventeen (17) years of age and not the spouse of defendant, by means of defendant's hand[.]

saying is, under that definition, there could have been - - they could find one touching of the breast, and either one of these counts would cover it?" Counsel said, "That's correct." Later in the discussion, defense counsel stated:

> We have two separate counts. And we aren't going to know whether the jury believed - - if they find him guilty of both counts, whether they believed that it just happened one time, and they found him guilty on both counts because it happened one time, or whether they believe that there were two separate instances.

The court shared defense counsel's concern because "the way these are worded, without further instruction, that jury could believe there was only one - - I don't think it's likely, but I think they could believe there was only one event, and both of these would fit that event" because it occurred prior to 2014. Defense counsel argued by splitting the charges into two counts, instead of one, the State should still have to do "the same thing, of electing one or, basically, *dismissing a count* and going forward on just one."

The next day, the State asked if the trial judge if "we have to elect," between counts II and III and the trial judge said, "No, I don't think you have to elect . . . I just want to make sure the jury understands its two separate instances . . . and they can't use the same instance to fill both Count Two and Count Three." Defense counsel did not object or make an explicit request to the trial court for an election.

During the formal charge conference, defense counsel made the following objection:

> Yes, sir, Your Honor. We would object to Counts Two and Three on the basis that the language in both of those counts is exactly the same. They both allege the same action, the touching of the breast of [complainant] by defendant's hand. The concern of the defense is that that brings up a double-jeopardy issue. The jury could believe that the defendant committed one act of touching the breast, and that qualifies -- would qualify for a guilty verdict under both Counts Two and Three, which he would be convicted twice for one act. . . .
>
> You know, it's clear within the charge that the "on or about" dates are not specific. They are a guideline. As long as it happens prior to the date of the indictment, it qualifies as an "on or about"

> date. So the fact that the dates in Counts Two and Three are different doesn't really matter, because the jury is instructed that they can find any time before the indictment. So the defense has some serious concerns about that. *And we believe that the only remedy to that is the State abandoning one of those counts.*
>
> I also believe that - - the Court has indicated that they don't believe that the State is required to elect which instance they are pursuing for prosecution. However, the defense does believe they are required to elect. In fact, in the paragraphs that we have included between Counts Two and Three, it specifically states, "The State has presented more than one act to prove that the defendant committed this count." That, in and of itself, from my reading of the case law, is what qualifies as giving the defense the right to force them to elect, is there are more than one act that's being alleged. So we believe the State is required to elect which instances they are pursing in this case.

The trial court overruled the objection.

We agree with the State that appellant's objection at trial does not comport with his arguments on appeal. Although appellant sometimes used the term "election" or "elect" at trial, an overall reading of appellant's exchanges with the court indicates he sought to have the State "elect" between two separate offenses because of concerns that the jury could convict him of both offenses based on one act, as specifically articulated in his double jeopardy objection during the charge conference. In fact, he argued the "only remedy to that is the State abandoning one of those counts" or "basically, dismissing a count and going forward on just one." However, those who commit multiple discrete assaults against the same victim are liable for separate prosecution and punishment for every instance of such criminal misconduct. *See Owens v. State*, 96 S.W.3d 668, 672 (Tex. App.—Austin 2003, no pet.). Thus, when multiple offenses are properly joined in a single indictment, each offense should be alleged in a separate count. *See* TEX. CODE CRIM. PROC. ANN. Art. 21.24(a) (West 2009). In such cases, the State is not required to elect between counts and each count may be submitted to the jury. *See Owens*, 96 S.W.3d at 672.

The record indicates the trial court had a clear understanding of appellant's concerns regarding double jeopardy and appellant's desire to force the State to proceed on one count. Appellant never argued, as he does on appeal, that he wanted the State to elect between specific evidence or particular acts to prove the charged offenses. To the extent the court was mistaken, if at all, in its understanding of appellant's "election" request, appellant failed to correct its belief—particularly given appellant twice argued "the only remedy" was to dismiss or abandon one of the counts.

The State is required to elect so as to "differentiate the specific evidence upon which it will rely as proof of the charged offense from evidence of other offenses or misconduct it offers only in an evidentiary capacity" thereby allowing the trial court "to distinguish evidence which the State is relying on to prove the particular act charged in the indictment from the evidence the State has introduced for other relevant purposes" and instruct the jury accordingly. *Phillips v. State*, 193 S.W.3d 904, 910 (Tex. Crim. App. 2006). Here, appellant failed to clearly articulate a request for the State to elect a particular act for each count. Accordingly, his argument on appeal does not comport with his objection at trial, and his issue is not preserved for review. *See* TEX. R. APP. P. 33.1; *Vasquez*, 483 S.W.3d at 554; *see, e.g., Bradley v. State*, No. 10-07-00119-CR, 2008 WL 4512567, at *5 (Tex. App.—Waco Oct. 8, 2008, pet. ref'd) (mem. op., not designated for publication) (concluding issue not preserved for review when appellant raised concerns about double jeopardy to trial court but argued on appeal trial court erred by failing to require State to elect).

Even though appellant failed to preserve his issue for review, we are cognizant of the trial court's responsibility to instruct the jury on the law applicable to the case and submit a charge that does not allow for the possibility of a non-unanimous verdict even when the State is not required to elect. *See Cosio v. State*, 353 S.W.3d 766, 776 (Tex. Crim. App. 2011). The court of criminal

appeals has emphasized that to guarantee unanimity in this context, the jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt. *Id*. Such an instruction should not refer to any specific evidence in the case and should permit the jury to return a general verdict. *Id*.

The trial court included the following instruction under count II and count III:

> The State has presented evidence of more than one act to prove that the defendant committed this count. In order to find the defendant guilty of this count, you must all agree on which act he committed. Understand that allegations in Counts II and III are separate instances occurring on different dates.

Such language instructed the jury that it must all agree as to which act appellant committed to find him guilty under each count; therefore, ensuring the verdict would be unanimous as to each count of criminal conduct. The charge further included separate application paragraphs and separate verdict forms as to each count. *See, e.g., Torres v. State*, No. 04-07-00873-CR, 2008 WL 5264869, at *4 (Tex. App.—San Antonio Dec. 17, 2008, no pet.) (mem. op., not designated for publication) (no charge error when court submitted separate application paragraph as to each count and jury received separate verdict forms as to each one). Accordingly, the trial court's charge did not deprive appellant of his right to a unanimous verdict. Appellant's first and second issues are overruled.

In his third issue, appellant argues the trial court erred by sua sponte instructing the jury on the lesser-included offense of aggravated sexual assault of child (count I). He claims the instruction was harmful because without the lesser-included offense, the jury would have acquitted him because they did not find him guilty of continuous sexual assault of a child.

Appellant incorrectly attributes the addition of the lesser-included offense to the trial court. During the charge conference, the State informed the trial court and defense counsel that "we have

added the lesser includeds under Count One for aggravated sexual assault of a child." Appellant did not object to the inclusion of the instruction or argue to the trial court or on appeal that it was an improper lesser-included offense. To the extent he argues he was harmed because of any strategic decision to take an "all or nothing approach" to his defense, his lack of any objection negates this assumption.

Aggravated sexual assault is a lesser-included offense of continuous sexual abuse. *See Dwyer v. State*, 532 S.W.3d 535, 542 (Tex. App.—San Antonio 2017, no pet.). Accordingly, the trial court did not err in giving the instruction. Appellant's third issue is overruled.

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CLAUDIUS GLEN HALLIDAY,
Appellant

No. 05-17-00233-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. 199-82679-2014.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

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

Judgment entered May 31, 2018.