Opinion issued May 5, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00395-CR

EVER RODRIGUEZ GONZALEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1393508

MEMORANDUM OPINION

A jury found appellant, Ever Rodriguez Gonzalez, guilty of the felony offense of indecency with a child[1] and assessed his punishment at confinement for two years.

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1 *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon 2011).

In his sole issue, appellant contends that the trial court erred in instructing the jury regarding its "option[s]" during the punishment phase of trial.

We affirm.

Background

The complainant testified that in July 2012, when she was twelve years old, she spent more time than usual at her cousin's house because her mother was "work[ing] a lot." Her cousin, Melissa, lived with the complainant's aunt and appellant, to whom the complainant's aunt was married. The complainant explained that she "listened" to appellant because she "really looked up to him" and "trusted him." She "saw him as like a dad . . . because [her] dad was never really around," and he was "like a second father to [her]."

One night, as the complainant, Melissa, and appellant watched a movie in the living room of the house, Melissa fell asleep. The complainant then fell asleep, but she awoke to appellant "touching" her, over her clothing, "on [her] vagina" with "[h]is fingers." Appellant told her, "[s]hoosh," "[i]t's okay," and "[i]t's all going to be okay." Appellant continued "rub[bing]" the complainant for approximately five minutes, and she "[f]elt weird" as he touched her because "[i]t wasn't something that [she had] felt before." The complainant did not tell appellant to stop or "say anything" because she was "[s]cared," "didn't know what was going on," and "didn't know what he was doing." She also did not tell Melissa because she "didn't know

how to describe it" or "what it was," and she was concerned that Melissa would not believe her.

Subsequently, on a Sunday morning, Melissa woke the complainant and told her to go to appellant's bedroom to ask "where [they] were going to eat . . . breakfast." When she went to appellant's room, he told her to close the bedroom door, and she did. Appellant then told the complainant to "come to him." When she did, he "pulled [her] really close," and she could feel that "he had . . . a boner"; his penis was "hard" and "hitting" her. After appellant "hug[ged]" her, he "reached his hand down" and "grabbed [her] butt," "touch[ed]" it, and then "squeeze[d]" it, which made her "[u]ncomfortable." Appellant next told the complainant "to get on the bed." When she complied, he "bent [her] over," with her face "on the bed and [her] butt . . . sticking out." As appellant stood behind her, he started "humping" her, "pushing [his body] back and forth" with his hands on her waist. His penis, which was "[h]ard," "touch[ed] [her] butt." Appellant also "reach[ed] down" and "touch[ed]" the complainant's breasts, "squeez[ing]" and "rub[bing]" them. Although she and appellant were clothed during the entire incident, he tried to pull her shorts off and "pull up [her] shirt and get under" it.

During "another incident," when the complainant and appellant were in the kitchen of the house, he told her that he "want[ed] to try something with" her. He then "st[u]ck his tongue in [her] mouth" and "mov[ed]" it around. The complainant

"told him to stop" because "[i]t was . . . weird" and she had "never" before done something like that.

On another occasion, when the complainant and appellant were watching television in the living room of the house, he said, "Oh, come here." When she did, he stood up, and gave her a "hug," which was "more close[]" than a "regular hug." After he hugged her, he "bent [the complainant] over the couch," "facedown," with her buttocks "up," and "[s]tarted . . . humping" her. She could feel that appellant "had another boner," and he again touched her "butt" with it.

Still, on another occasion, Melissa asked the complainant to see whether appellant would go to a Target store to purchase "something for her phone." When the complainant went to appellant, who was in his bedroom, he "hug[ged]" her. Again, she felt that "[h]e had a boner," which he "push[ed] . . . up against [her] vagina." Appellant then started moving his body "up and down," "rub[bing]" his penis against the complainant and "tilt[ing] his pelvis towards [her]."

The complainant further testified that "more than once," when appellant "had a boner," he took her hand and "rub[bed]" it "up against" his penis. When he took her hand, he "push[ed] it up against him" and "use[d] his other hand to . . . rub [his penis]," "[l]ike he . . . move[d] [her] hand for [her]."

The complainant also explained that appellant "always told [her] never to tell" anyone about what he had done to her because he would "get in trouble with the

police." And she did not tell Melissa what he had done to her because she knew that appellant was important to both Melissa and the complainant's aunt, she did not "want to hurt Melissa," and appellant "supported" Melissa and the complainant's aunt "with money." She also did not tell her mother because she "didn't know how to tell her." In August 2012, the complainant finally told her "best friend," Marisa, what appellant had done because she "couldn't hold it in anymore," "felt like [she] could explain it better to [Marisa]," and Marisa "could understand it." She told Marisa not to report what appellant had done to law enforcement because she was "scared" and thought that appellant "would do something to [her] if [she] told" anyone. Marisa, however, did tell her mother what appellant had done to the complainant, and Marisa's mother relayed that information to the complainant's mother.

Tasha Rodgers-James, previously a forensic interviewer for the Children's Assessment Center, testified that on August 24, 2012, she interviewed the complainant, who was twelve years old. During the interview, the complainant described "four to five instances" of "sexual conduct" involving appellant in the kitchen, living room, and bedroom of his house.

After the jury found appellant guilty of the felony offense of indecency with a child, the trial court, in regard to punishment, instructed the jury in pertinent part:

> Having found the defendant, Ever Rodriguez Gonzalez, guilty of indecency with a child, it now becomes your duty to assess the punishment in this case.
>
> Our statutes provide that the punishment for indecency with a child shall be by confinement in the institutional division of the Texas Department of Criminal Justice for not less than two years nor more than twenty years. In addition thereto, a fine not to exceed $10,000.00 may be assessed.
>
> Therefore, you will assess the punishment of the defendant upon said finding of guilt at confinement in the institutional division of the Texas Department of Criminal Justice for any term of not less than two years nor more than twenty years, and the jury in its discretion may, if it chooses, assess a fine in any amount not to exceed $10,000.00.

Standard of Review

A trial court must instruct a jury by "a written charge distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007); *McIntosh v. State*, 297 S.W.3d 536, 542 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). A review of jury-charge error involves a two-step analysis. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). First, we must determine whether error actually exists in the charge, and, second, if error does exist, we must determine whether sufficient harm resulted from the error to require reversal. *Ngo*, 175 S.W.3d at 744; *Abdnor*, 871 S.W.2d at 731–32. If error was not preserved at trial by a proper objection, an error will not result in reversal unless the record shows "egregious

harm" such that the defendant was denied a fair and impartial trial.[2] *Warner v. State*, 245 S.W.3d 458, 461–62 (Tex. Crim. App. 2008); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Charge Error

In his sole issue, appellant argues that the trial court erred in instructing the jury regarding its "option[s]" during the punishment phase of trial because the charge did not "contain the available punishment option of community supervision," resulting in "egregious harm" to him. In response, the State argues that the trial court's charge to the jury "at punishment did not include an instruction authorizing [it] to recommend community supervision because appellant was not eligible for community supervision."

A person commits the offense of indecency with a child if he engages in sexual contact with a child who is younger than seventeen years old and who is not the person's spouse. TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon 2011). "[S]exual contact" includes, but is not limited to, the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: any touching by a person, including touching through clothing, of any part of the genitals of a child. *Id.* § 21.11(c)(1). Indecency with a child is a second degree felony offense and

[2] Appellant concedes that he did not object to the jury charge at trial and he must show egregious harm.

punishable by imprisonment "for any term of not more than 20 years or less than 2 years" in addition to "a fine not to exceed $10,000." *Id.* § 12.33 (Vernon 2011).

Jury-recommended community supervision is governed by article 42.12, section 4 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4 (Vernon Supp. 2015). Whether a defendant found guilty of the offense of indecency with a child is eligible for jury-recommended community supervision depends on the child's age at the time the offense was committed. *See id.* art. 42.12, §§ 3g(a)(1)(C), 4(d)(5). If the child was younger than fourteen years old at the time of the offense, a defendant is categorically ineligible for community supervision. *Id.*; *Reich v. State*, No. 05-14-00562-CR, 2015 WL 4505937, at *3 (Tex. App.—Dallas July 24, 2015, pet. ref'd) (mem. op., not designated for publication). However, if the child was fourteen years old or older at the time of the offense, a defendant is eligible for community supervision, assuming a jury recommends it. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(d)(5).

A trial court must charge the jury fully and affirmatively on the law applicable to every issue raised by the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14; *Ponce v. State*, 89 S.W.3d 110, 118 (Tex. App.—Corpus Christi 2002, no pet.). For a defendant to be entitled to submission to a jury of a question on the issue of community supervision, he must, pursuant to article 42.12, file a written sworn motion for community supervision, and the evidence must support his eligibility for

community supervision.[3] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(e); *Palasota v. State*, 460 S.W.2d 137, 140–141 (Tex. Crim. App. 1970); *Green v. State*, 658 S.W.2d 303, 308–09 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd). And a trial court does not err in refusing not submitting to a jury a question on the issue of community supervision in the absence of evidence supporting the defendant's motion. *Thompson v. State*, 267 S.W.3d 514, 519 (Tex. App.—Austin 2008, pet. ref'd); *Green*, 658 S.W.2d at 309; *see also Walker v. State*, 440 S.W.2d 653, 659 (Tex. Crim. App. 1969) (not necessary to submit issue of community supervision to jury where "no proof or evidence before the jury to support the same").

The burden of proof as to eligibility for community supervision is on the defendant. *Baker v. State*, 519 S.W.2d 437, 437 (Tex. Crim. App. 1975); *Green*, 658 S.W.2d at 308. And in this case, for appellant to be eligible for community supervision, the evidence must support a conclusion that the complainant was not "younger than 14 years of age at the time the offense was committed." *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 3g(a)(1)(C), 4(d)(5).

The complainant testified that in July 2012, when the offense occurred, she was twelve years old. She also testified that at the time of trial, in March 2015, she was fourteen years old and it had been "almost . . . three years" since appellant had

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[3] The State concedes that "appellant filed a motion for community supervision several days prior to trial."

touched her inappropriately. Further, in regard to some of appellant's behavior with her in July 2012, the complainant explained that she "didn't know what" he was doing because she "was 12" years old at the time. And in regard to speaking with "[a] forensic interviewer at the Children's Assessment Center" in August 2012, she explained that "there [were] some things that . . . [she] didn't even tell" the interviewer about "what had happened between" her and appellant "because [she] was still 12 [years old] at the time" and "didn't really know how to talk about it."

Further, Rodgers-James testified that she interviewed the complainant on August 24, 2012, when the complainant was twelve years old. And during the interview, the complainant described "four to five instances" of "sexual conduct" involving appellant at his home.

The evidence in the record regarding the complainant's age at the time of the offense is uncontroverted. Thus, appellant failed to meet his burden of establishing his eligibility for community supervision.[4] Without evidence in the record to support appellant's eligibility for community supervision, the trial court necessarily did not err in not instructing the jury regarding the issue of community supervision. *See Smiley v. State*, 129 S.W.3d 690, 695 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (where defendant "ineligible to receive jury-recommended community supervision,"

[4] Appellant does not direct this Court to any evidence in the record indicating that the complainant was fourteen years old or older at the time of the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(d)(5) (Vernon Supp. 2015).

trial court did not err "by denying the jury the option to recommend community supervision in the punishment jury charge").

In support of his argument that the trial court's "punishment charge was erroneous because it failed to contain the available punishment option of community supervision," appellant relies on *Alleyne v. United States*, 133 S. Ct. 2151 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Appellant asserts that the United States Supreme Court has clearly held that "any fact finding that increases the mandatory minimum punishment for an offense must be submitted to a jury and found beyond a reasonable doubt." Thus, he concludes that the trial court, in this case, erroneously made "the finding *itself* that the complainant was under 14 years of age at the time of the offense." (Emphasis added.)

In *Alleyne*, the defendant was charged with "multiple federal offenses," including "using or carrying a firearm in relation to a crime of violence." 133 S. Ct. at 2155; *see* 18 U.S.C. § 924(c)(1)(A). Section 924(c)(1)(A) provides, in pertinent part, that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall: (i) "be sentenced to a term of imprisonment of not less than 5 years"; (ii) "if the firearm is brandished, be sentenced to a term of not less than 7 years"; and (iii) "if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." 18 U.S.C. § 924(c)(1)(A). The jury found the defendant guilty, indicating on its verdict form that he had "'[u]sed or carried a firearm during and in relation to

a crime of violence,'" but not "indicat[ing]" that he had "[b]randished" the firearm. *Alleyne*, 133 S. Ct. at 2156 (internal quotations omitted). The defendant objected to the presentence report recommendation of a seven-year sentence, arguing that "the jury did not find brandishing beyond a reasonable doubt and that he was subject only to the 5-year minimum for 'us[ing] and carr[ying] a firearm.'" *Id.*; *see also* 18 U.S.C. § 924(c)(1)(A) (if firearm "brandished," punishment set at "a term of imprisonment of not less than 7 years"). The district court overruled the defendant's objection, finding that "the evidence supported a finding of brandishing" and sentencing him to confinement for seven years. *Alleyne*, 133 S. Ct. at 2156.

The United States Supreme Court disagreed, holding that "[f]acts that increase the mandatory minimum sentence are . . . elements [of the charged offense] and must be submitted to the jury and found beyond a reasonable doubt."[5] *Id.* at 2158. The Court explained:

> [B]ecause the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury, regardless of what sentence the defendant *might* have received if a different range had been applicable. Indeed, if a judge were to find a fact that increased the statutory [minimum] sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact).

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[5] Similarly, in *Apprendi v. New Jersey*, the Supreme Court held that any fact that increases the prescribed maximum sentence is an element of the offense to be found by the jury. 530 U.S. 466, 483, 490, 120 S. Ct. 2348, 2362–63 (2000).

Id. at 2162.

According to appellant, a "minimum sentence of two years in prison is by any measure an increased 'punishment' over a minimum sentence which does not require serving time in prison," i.e., community supervision. *See* TEX. PENAL CODE ANN. § 12.33 (second degree felony offense punishable by imprisonment "for any term of not more than 20 years or less than 2 years"). However, "community supervision is not a sentence or even a part of a sentence." *Speth v. State*, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999); *Hassan v. State*, 440 S.W.3d 684, 687 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see also Mayes v. State*, 353 S.W.3d 790, 793 (Tex. Crim. App. 2011) (sentence and community supervision "are entirely different matters").

Indeed, the Texas Code of Criminal Procedure defines "[c]ommunity supervision" as "the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which . . . a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and *the imposition of sentence is suspended*." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 2(2)(B) (emphasis added); *see also Speth*, 6 S.W.3d at 532 (Texas Code of Criminal Procedure defines "community supervision" as "a *suspension of the sentence*"). "In other words, community supervision is an arrangement *in lieu of* the sentence, *not a[] part of* the sentence." *Speth*, 6 S.W.3d at 532. Thus, whether a defendant is eligible for

community supervision has no bearing on the "mandatory minimum" or "mandatory maximum" sentence that he may receive. Thus, appellant's reliance on *Alleyne* and *Apprendi* is misplaced.

Accordingly, we hold that the trial court did not err in not submitting to the jury a question on the issue of community supervision. *See Smiley*, 129 S.W.3d at 695.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

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