Opinion issued October 22, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00168-CR

EDUARDO VARGAS BALANZAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Case No. 81706-CR (Counts I, II, and III)

MEMORANDUM OPINION

A jury found appellant, Eduardo Vargas Balanzar, guilty of two "counts" of the felony offense of aggravated assault of a child[1] and a third "count" of the felony

[1] *See* TEX. PENAL CODE ANN. §§ 22.011(a)(2)(A), 22.021(a)(1)(B)(iii), (a)(2)(B), (e).

offense of indecency with a child.[2] The jury assessed appellant's punishment at confinement for seventy-five years for the first "count," confinement for eighty-five years for the second "count," and confinement for twenty years for the third "count." The trial court ordered the sentences for the first and second "counts" to run concurrently and the sentence for the third "count" to run consecutively with the sentences for the first two "counts." In two issues, appellant contends that his trial counsel provided him with ineffective assistance of counsel.

We affirm.

Background

The complainant was fourteen years old when she testified at trial. She stated that when she was about six years old, she was living in Freeport, Texas with her mother, stepfather, her twin sister, and her younger brothers. Their home had a guest room with "just a bed." Sometimes her uncles and their friends or her mother's cousin would come to visit and stay overnight at the home in the guest room. The complainant remembered being uncomfortable "one time," "about 3:00 or 4:00 in the morning," when appellant, her mother's younger brother, was visiting. She went into the guest room, and appellant asked her "to rub . . . his thing, but [she] didn't know what it was at the time." She clarified that his "thing" referred to appellant's penis. The complainant did what appellant asked "[b]ecause [she] was taught to

[2] *See* TEX. PENAL CODE ANN. § 21.11(a)(1), (d).

respect somebody older than [her] and to listen to what they say." She felt like if he was asking her to do something, it was okay. She trusted and loved appellant, and up to that point, she had no reason not to trust him. At first, she obeyed appellant when he asked and put her hand on his penis, but "then [she] like stopped and [he] . . . grabbed [her] hand and put it back." When appellant let her leave the guest room, the complainant returned to her bedroom and watched a Disney movie.

When the complainant was nine years old, and in the third grade, she and her mother, father, twin sister, and younger brothers lived in a home in a trailer park in Angleton, Texas. The complainant and her twin sister shared a bedroom that was furnished with a bunk bed, a dresser, and a television mounted on the wall. One day when appellant was visiting the complainant's home, the rest of the family had gone grocery shopping and left the complainant alone in the house with appellant. She was supposed to be cleaning her room, but instead was lying on the bottom bunk, which was her "[twin] sister's bed," with her head "close to the wall." Appellant entered the room. The complainant "didn't think anything of it at first," but then he took off her "shorts and her drawers." Next, he removed his clothes and "[h]e stuck his thing in [her] thing," which, she clarified, meant he inserted his penis into her vagina. "It hurt," and she could tell "he was just—he was drunk." She could smell the "alcohol on his breath." The complainant did not tell her mother about the sexual

assault because she did not know what sex was at the time, so she "didn't think anything was wrong," and she "still loved and trusted" appellant.

Several months later, while the complainant's family was still living in their home at the trailer park, the complainant's maternal grandmother "mov[ed] out of her house—her old trailer" across the street, and the complainant's "Uncle Michael" moved into it. About 8:00 or 9:00 p.m. one evening, "the power shut off" in the complainant's home, and the complainant's mother told "[the complainant], [her twin] sister, and [her] little brothers to go across the street" to their Uncle Michael's house. The door to Uncle Michael's house was locked so the complainant and her siblings went to the home next door and found Uncle Michael visiting with the neighbors. Uncle Michael went back to his home with the complainant and her siblings and unlocked the door.

The complainant, her twin sister, and her younger brothers gathered "in the living room" of Uncle Michael's home. Then, the complainant's twin sister "got hungry" and went to the kitchen "to cook bacon." After the complainant and her siblings ate, the complainant's twin sister and brothers went to sleep in the living room. The complainant "started getting cold," "[s]o [she] went to her [U]ncle[] [Michael's] room to go get some socks to put on [her] feet." She was alone in the room, which was furnished with only a mattress on the floor. She found some socks, "grabbed [them,]" sat down on the mattress, and "put them on [her] feet." As she

pulled on the socks, she "heard the door open." At first, the complainant thought it was her Uncle Michael, but she then realized it was appellant. Appellant was walking "weird and wobbly," like he was drunk; she could smell the "alcohol on his breath." Appellant pushed the complainant down onto the mattress and told her to "shush." Appellant removed the complainant's shorts, underwear, and shirt, then, he took off his own shorts and put his penis into her vagina.

The complainant did not tell her mother about the sexual assault until a few years later, when she was twelve years old, because she "was scared of [her] mom," and believed that her mother would "yell at her or whip her." And the complainant was confused about what appellant had done to her.

The complainant also explained that she "didn't understand what had happened" to her until some of her female cousins began "coming out about stuff that had happened to them" at the hands of another relative. To the complainant, the discussion felt like an opportunity to "just tell" what had happened to her. At first, the complainant just told her mother about "what [had] happened when [she] was six [years old]." Eventually though, the complainant felt like she had a better understanding about what had happened to her. And a few weeks later, the complainant texted her mother from school, writing: "I lied about [appellant] not raping me. I'm just so terrified of you and don't know how to tell you things. So I'm sorry. Please don't be mad at me."

Later that day, when the complainant arrived home after school, she told her mother about what appellant had done to her. A few days after that, she had an appointment with her psychiatrist and "just kept getting questions about it." Trying to answer the questions made her feel overwhelmed, and she said to the psychiatrist, "[I]f I hear another question, I'm going to kill myself." Following the appointment, the complainant was admitted inpatient to a mental hospital, where she stayed for about nine days.

The complainant's mother testified that appellant is her brother. Around January 2017, some of mother's cousins disclosed that they had been sexually abused by someone else in mother's family—one of mother's uncles. Because the complainant's mother had taken her children "to spen[d] the night at [their] grand[mother]'s house where [mother's] uncle lived," the complainant's mother asked the complainant and her twin sister "if anything had happened when [they] went to go stay . . . the night" there. The girls told the complainant's mother that nothing had happened involving them.

The complainant's mother also confirmed that she received a text message that the complainant sent her while the complainant was at school. Later that day, the complainant's mother spoke with the complainant about appellant's behavior toward her and then brought the complainant to the Brazoria County Sheriff's Office ("BCSO") to report the sexual assaults by appellant. She and the complainant each

wrote out a statement. When the law enforcement officer asked about appellant's whereabouts, the complainant's mother told the officer that appellant was working in Tennessee.

The complainant's mother also recalled meeting with BCSO Investigator P. Newsom at the Children's Assessment Center (CAC) in Angleton. At trial, the complainant's mother could not remember whether Newsom had trouble reaching her, but she remembered that the first couple of weeks after the complainant told her about the sexual assaults were "very hard" for her; she "didn't answer [her] phone. [She] didn't want to talk to anyone." She did not think any delay on her part in contacting Newsom would be a problem because she "knew [the complainant] wasn't going to see [appellant] again." After having her memory refreshed, the complainant's mother remembered missing the complainant's initial CAC appointment because mother overslept. And the complainant's mother acknowledged that she did not inform Newsom that the complainant had gone inpatient at a mental hospital. Mother also did not return Newsom's calls for about a week.

BCSO Deputy J. Hargrave testified that on January 18, 2017, he was called to the Angleton Police Department to take a report of a past sexual assault that occurred in the jurisdiction of the BCSO. He met with the complainant, whom he described as reserved and quiet. At Hargrave's request, the complainant typed out a statement

about the sexual assaults committed by appellant. The next day, he notified Child Protective Services about the complainant's report. In February 2018, Stephanie Bernadac, a bilingual forensic interviewer, conducted the complainant's interview at the Brazoria County CAC. In February 2018, appellant was found in Atascosa County, Texas.

Appellant testified that he has never been in Tennessee. And he denied having had any communication with the complainant's maternal grandmother or the complainant's mother between January 2017—when the complainant's allegations of sexual assault came to light—and the date of his arrest in February 2018.

Appellant also denied that he engaged in any of the behavior described by the complainant, saying that the complainant was lying and that he did not know "why she would tell such a story." The only reason that appellant could think of for why the complainant might lie about him sexually assaulting her "is that she's probably mad at [him] for maybe not coming for Christmas or the time that [he] was out of town or New Year's." Appellant also said that people lied about things like this because they wanted attention, but he then agreed with the State on cross-examination that the complainant did not seem like she liked the attention.

Standard of Review

The Sixth Amendment guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. amend. VI; *Garcia v.*

State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). To prove a claim of ineffective assistance of counsel, appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Appellant has the burden to establish both prongs by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). And "appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance falls within the range of reasonable professional assistance or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). To rebut that presumption, a claim of ineffective assistance must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *See Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (internal quotations omitted).

The trial record alone is rarely sufficient to show ineffective assistance. *Williams v. State*, 526 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. (Tex. Crim. App. App. 2005); *see also Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007) (noting "presumption that trial counsel's performance was reasonably based in sound trial strategy"). In the rare case in which trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. *Lopez*, 343 S.W.3d at 143. The record must demonstrate that counsel's performance fell below an objective standard of reasonableness as a matter of law and no reasonable strategy could justify trial counsel's acts or omissions, regardless of counsel's subjective reasoning. *Id*.; *see also Menefield*, 363 S.W.3d at 593 (when trial counsel is not given opportunity to explain his actions, "the appellate court should not find deficient performance unless the challenged conduct was so outrageous that no competent attorney would have engaged in it") (internal quotations omitted).

Ineffective Assistance

In his first and second issues, appellant argues that his trial counsel did not provide him with effective assistance of counsel because he failed to object to the trial court's charge to the jury.

We must first determine whether the trial court erred in submitting the charge to the jury as written because trial counsel is not ineffective for failing to object to a proper charge. We review complaints of jury-charge error under a two-step process, considering first whether error exists. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013); *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). If error does exist, we then review the record to determine whether the error caused sufficient harm to require reversal. *Wooten*, 400 S.W.3d at 606. If the defendant preserved error by timely objecting to the charge, an appellate court will reverse if the defendant demonstrates that he suffered some harm as a result of the error. *Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009). If, as here, the defendant did not object at trial, we will reverse only if the error was so egregious and created such harm that the defendant did not receive a fair and impartial trial. *Id.* at 26. If an error does not amount to egregious harm, a defendant cannot show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Tottenham v. State*, 285 S.W.3d 19, 34 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

The trial court has an absolute duty to prepare a jury charge that accurately sets out the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14; *Oursbourn v. State*, 259 S.W.3d 159, 179 (Tex. Crim. App. 2008); *see also Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012) ("The purpose of the trial judge's jury charge is to instruct the jurors on all of the law that is applicable to the case."). It must give the instruction for the law applicable to the case regardless of whether it has been specifically requested. *Oursbourn*, 259 S.W.3d at 179–81.

In the application paragraphs of the charge in this case, the trial court instructed the jury:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 1st day of February, 2014, in Brazoria County, Texas, [appellant], did then and there intentionally or knowingly cause the sexual organ of [the complainant], a child younger than fourteen (14) years of age and not [appellant's] spouse, to contact the sexual organ of [appellant], then you will find [appellant] guilty of the offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count One of the indictment.
>
> . . . .
>
> You will next proceed to consider whether or not [appellant] is guilty of Count Two.
>
> Now, if you find from the evidence beyond a reasonable doubt that on or about the 1st day of June, 2014, in Brazoria County, Texas, [appellant], did then and there intentionally or knowingly cause the sexual organ of [the complainant], a child younger than fourteen (14) years of age and not [appellant's] spouse, to contact the sexual organ of [appellant], then you will find [appellant] guilty of the offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count Two of the indictment.

. . . .

> You will next proceed to consider whether or not [appellant] is guilty of Count Three.
>
> Now, if you find from the evidence beyond a reasonable doubt that on or about the 1st day of March, 2012, in Brazoria County, Texas, [appellant], did then and there with the intent to arouse or gratify the sexual desire of [appellant], intentionally or knowingly cause [the complainant], a child younger than seventeen (17) years of age and not [the] spouse of [appellant], to engage in sexual contact, by causing the [complainant] to touch the genitals of [appellant], then you will find [appellant] guilty of the offense of INDECENCY WITH A CHILD BY CONTACT, as alleged in Count Three of the indictment.
>
> The charge also instructed the jury that:
>
> You are further charged as the law in the case alleging AGGRAVATED SEXUAL ASSAULT and INDECENCY WITH A CHILD BY CONTACT, that the State is not required to prove the exact date alleged in the indictment so long as said offenses, if any, occurred before the filing of the indictment.

The verdict returned by the jury on each "count" corresponded to each of the application paragraphs, reciting for "Count 1," for example: "We, the jury, find [appellant], guilty of the offense of Aggravated Sexual Assault, as alleged in Count One of the indictment."

A. Double Jeopardy

In his first issue, appellant argues that his trial counsel's performance fell below an objective standard of reasonableness because counsel did not object to a jury charge that permitted the jury to convict appellant more than once for a single allegation in violation of the Double Jeopardy Clauses of the United States and

Texas Constitutions. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 14. According to appellant, his trial counsel should have ensured that the jury charge contained an additional instruction "that [the jury] could not use the same allegation to convict appellant on more than one count."

"The initial inquiry in reviewing a claim of double jeopardy is whether the State is attempting to prosecute the defendant more than once for the same offense." *Goodbread v. State*, 912 S.W.2d 336, 339 (Tex. App.—Houston [14th Dist.] 1995), *aff'd, Ex parte Goodbread*, 967 S.W.2d 859 (Tex. Crim. App. 1998). "For Double Jeopardy purposes, the same offense means the identical criminal act, not the same offense by name." *Ex parte Goodbread*, 967 S.W.2d at 860 (internal quotation omitted).

According to appellant, although each "count" in the trial court's instructions to the jury specifies a particular date, the "on or about" language in each application paragraph permits the jury to find that appellant committed each charged offense on any date before the presentment of the indictment. *See Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997). Appellant argues that because "each of the three allegations was before the filing of the indictment," the jury could have found him guilty on more than one "count" for the same conduct, in violation of the prohibition against double jeopardy. And appellant argues that his trial counsel's performance was deficient because counsel failed to request an additional instruction that the jury

"could not use the same allegation to convict appellant on more than one count." Because the jury was not so instructed, the trial court's charge violated the constitutional prohibition against double jeopardy by subjecting appellant to the risk of multiple punishments for the same act.

Appellant's argument misunderstands the primary purpose for specifying a date in the indictment, which is "not to notify the accused of the date of the offense but rather to show that the prosecution is not barred by the statute of limitations." *Garcia v. State*, 981 S.W.2d 683, 686 (Tex. Crim. App. 1998). Here, the trial court's charge instructed the jury on each separate "count" of the indictment, and each "count" had its own corresponding verdict form. The evidence at trial showed the commission of three discrete criminal acts, occurring in a chronological order consistent with the allegations in each "count." The use of "on or about" language in the application paragraphs did not relieve the State from proving each of the criminal acts alleged, nor would it prevent a reasonable juror from understanding that each "count" corresponded to a specific offense alleged and proven by the State. *See Ex parte Goodbread*, 967 S.W.2d at 860.

On this record, an additional instruction warning the jury "that it could not use the same allegation to convict appellant on more than one count" was unnecessary. Thus, because the trial court did not err in instructing the jury, as appellant asserts in his first issue, we hold that appellant has not established that his trial counsel's

performance fell below an objective standard of reasonableness for failing to object to the trial court's charge on double-jeopardy grounds.

We overrule appellant's first issue.

B. Unanimity

In his second issue, appellant argues that his trial counsel's performance fell below an objective standard of reasonableness because counsel did not object to a jury charge that violated appellant's right to a unanimous verdict. Appellant asserts that the jury should have been instructed that "it must be unanimous as to which allegation . . . applied to which 'count.'"

The Texas Constitution and the Texas Code of Criminal Procedure require that the jury in a criminal case reach a unanimous verdict. TEX. CONST. art. V, § 13; TEX. CODE CRIM. PROC. ANN. art. 36.29(a); *Ngo*, 175 S.W.3d at 745. Unanimity means that the jurors must agree that the defendant committed one specific crime. *See Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008). Appellant complains that the trial court's instructions to the jury did not specifically inform the jurors that they had to be unanimous as to which separate criminal act they believed constituted each "count." And thus, according to appellant, the charge left open the possibility that the jurors could return a guilty verdict on one "count" without an agreement as to the underlying conduct.

Here, even if we were to presume that the trial court erred in instructing the jury on unanimity and appellant's trial counsel's performance fell below an objective standard of reasonableness because he failed to object to the charge on such a ground, appellant is unable to show that he was prejudiced by his trial counsel's presumed deficient performance.

In *Arrington v. State*, 451 S.W.3d 834 (Tex. Crim. App. 2015), a case involving six "counts" of the felony offense of aggravated sexual assault of a child and one count of the felony offense of indecency with a child, the Texas Court of Criminal Appeals held that the absence of a specific unanimity instruction was error but such error did not cause egregious harm, even though the trial court's charge did not specifically inform the jurors that they had to be unanimous as to which separate criminal act they believed constituted each "count." *Id.* at 841–42. In reaching that holding, the Court of Criminal Appeals observed that the trial court's jury instructions contained a general instruction requiring that the verdict be unanimous, as well as confirmation that the verdict was unanimous before it was pronounced. *See id.*

Virtually the same safeguards are present here. The trial court's charge generally instructed the jurors that their verdict had to be unanimous:

> After argument of counsel, you will retire and select one of your members as your presiding juror. It is her or his duty to preside at your deliberations and to vote with you in arriving at a verdict. Your verdict must be unanimous, and after you have arrived at your verdict, you may

> use the forms attached hereto by having your presiding juror sign her or his name. Your presiding juror will sign one form only for each count.

See id. at 838; *see also Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005) (jury would have understood it was to consider all of trial court's instructions contained in charge, and, absent evidence to contrary, we must presume jury understood and followed instructions). And, here, as in *Arrington*, before announcing the verdict, the presiding juror confirmed that it was "the unanimous verdict of all the members of the jury[.]"

Appellant does not identify anything in the arguments of counsel or elsewhere in the record that might have exacerbated the trial court's presumed error in failing to include a specific unanimity instruction. The trial court's charge to the jury set forth three different "counts," each relating to a separate offense. *See Hiatt v. State*, 319 S.W.3d 115, 127 (Tex. App.—San Antonio 2010, pet. ref'd) (holding no jury unanimity problem where "jury charge contained ten different counts, each relating to a separate and distinct offense"); *Bottenfield v. State*, 77 S.W.3d 349, 359 (Tex. App.—Fort Worth 2002, pet. ref'd) (holding unanimity requirement not violated when jury charge stated "two separate counts with two separate and distinct offenses in each case"). The evidence at trial did not contain any inconsistency as to which conduct occurred on which date, and neither the court nor the parties at trial misstated the law requiring unanimity. The trial court's charge submitted each

"count" of the indictment to the jury on a separate verdict form, and the jury found appellant guilty each "count" charged in the indictment.

Because appellant has failed to show any actual harm resulted from the lack of an additional instruction in the trial court's charge related to unanimity, we hold that appellant has failed to show that there is a reasonable probability that, but for his trial counsel's presumed error, the result of the proceeding would have been different.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Lloyd, Landau, and Countiss.

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