Opinion issued November 5, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00780-CR

ANTHONY MAMBOLEO NYAKEO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 371st District Court
Tarrant County, Texas[1]
Trial Court Case No. 1607767R (Counts I and II)

MEMORANDUM OPINION

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 19–9091 (Tex. Oct. 1, 2019); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases); TEX. R. APP. P. 41.3 ("In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court . . . .").

A jury found appellant, Anthony Mamboleo Nyakeo, guilty of two "counts" of the felony offense of aggravated sexual assault of an elderly or disabled person[2] and assessed his punishment at confinement for life for each "count," to run concurrently. In two issues, appellant contends that the trial court erred in admitting certain evidence and instructing the jury during the punishment phase of trial.

We affirm.

Background

Alyssa Osario, a licensed vocational nurse, testified that in January 2018, she worked as a charge nurse at Woodridge nursing home—a licensed nursing home facility for elderly and disabled patients in Tarrant County, Texas. As a charge nurse, she oversaw an entire floor of patients and provided care to the patients. She also supervised certified nursing aides ("CNAs"), including appellant. The CNAs were tasked with providing daily care for the nursing home patients, such as dressing them, changing them, cleaning them, and feeding them. The nursing staff at Woodridge nursing home, including the CNAs, were health care providers. According to Osario, appellant worked with her in January 2018 as a CNA, and they generally worked the same shifts.

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[2] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A), (a)(2)(C), (b)(2), (b)(3), (e); *see also id.* § 22.04(c).

As to the complainant, Osario testified that the complainant was one of the patients at Woodridge nursing home whom Osario oversaw. The complainant was more than sixty-five years old, disabled, non-verbal, incontinent, and unable to feed herself, move on her own, or vocalize. She suffered from dementia, which had caused her to "lose complete function over" herself. The complainant was unable to consent to anything on her own and her personal decisions were delegated under a power of attorney. She was emotionally and physically dependent on someone else to care for her. Appellant and the complainant were not married.

Osario explained that on one particular day in January 2018, she arrived at Woodridge nursing home around 2:00 p.m. for her shift. Upon arrival, she was notified that the complainant was "bleeding from her vagina." Osario examined the complainant, while her supervisor and a female medication aide were in the room. Osario found "a very large tear" "going into [the complainant's] vagina," which Osario found alarming because "[i]t's not something you see on an elderly woman" and would not have occurred naturally. The complainant was bleeding from the tear. Because Osario suspected that the complainant had been sexually assaulted, she followed the nursing home's protocol—she notified the nursing home's abuse coordinator and the complainant's family, who consented to the complainant being taken to the hospital. The complainant was taken by ambulance to the hospital for a sexual assault examination.

Violet Gorman, an emergency department certified nurse and a certified Adult Sexual Assault Nurse Examiner ("SANE") at John Peter Smith Hospital, testified that she has performed about 570 sexual assault examinations since 2012. On January 28, 2018, around 3:00 a.m., she performed a sexual assault examination on the complainant. The complainant, who was seventy-four years old at the time, was alert, tense, guarded,[3] and non-verbal. The complainant had dementia, and according to Gorman, was "somebody who [was not] oriented at all." The complainant was also bedridden and could not sit up. The complainant's nephew, the agent under her power of attorney, gave consent for the sexual assault examination. According to Gorman, given the complainant's mental state and history of dementia, the complainant was unable to "consent to anything." The complainant was elderly and disabled.

As part of the sexual assault examination, Gorman took vaginal, anal, perianal, vulvar, and buccal swabs from the complainant. Gorman explained that the complainant had significant injuries and several areas of trauma in her genital area.[4] The complainant had a large tear in her perineum, a tear at her anal verge, a laceration in her genital area—which Gorman described as a "huge trauma"—some

[3] Gorman testified that when a patient is guarded it typically means that she is nervous, afraid, or in pain.

[4] The trial court admitted into evidence photographs of the complainant's injuries.

small abrasions in her perineal area, and multiple small areas "of just missing skin." The large laceration went "completely through the whole bottom of [the complainant's] vagina almost to her anus and required [medical] intervention" and surgical repair.

The complainant also had anal laxity and decreased anal tone which was significant and abnormal. Gorman stated that the decreased anal tone and anal laxity indicated trauma and that "[s]omething [had] happened there consistently" or chronically. In total, Gorman noted three lacerations or tears in the complainant's genital area, and the complainant's injuries were consistent with her having been sexually assaulted. According to Gorman, the complainant's "vagina should have never looked like that." An improper vaginal examination would not have caused the complainant's injuries.

Grapevine Police Department Detective C. O'Rear testified that she was assigned to investigate the sexual assault of the complainant, a patient at Woodridge nursing home in Tarrant County, Texas. According to O'Rear, certain nurses at the nursing home found blood and a tear in the complainant's vagina. O'Rear noted that Osorio inspected the complainant's vagina because of the bleeding and Osorio felt that it was necessary to notify others at the nursing home. Someone at the nursing home notified law enforcement of the possible sexual assault, and the complainant was taken to the hospital for a sexual assault examination. The samples or swabs

taken from the complainant during her sexual assault examination were then sent to the University of North Texas ("UNT") Health Science Center for DNA testing. O'Rear stated that semen was found on the perianal and anal swabs collected from the complainant. According to O'Rear, the complainant sustained vaginal and anal injuries.

Detective O'Rear further testified that due to the discovery of semen in certain swabs collected from the complainant during her sexual assault examination, she sought to determine which male employees at Woodridge nursing home had taken care of the complainant leading up to the discovery of the sexual assault. O'Rear identified three possible males—appellant, Stephen Nyamboki, and Thomas Irechukwu. All three men were employees at Woodridge nursing home and had taken care of the complainant around the time of the sexual assault. As to appellant, O'Rear stated that appellant had been one of the individuals who had taken care of the complainant at the nursing home, and he had access to her at the time the sexual assault was committed. Appellant and the complainant were not married.

Detective O'Rear explained that she obtained DNA samples from Nyamboki, Irechukwu, and appellant. Nyamboki's DNA sample was sent to the UNT Health Science Center to be compared to the DNA of the semen found on the swabs taken from the complainant during the sexual assault examination. After receiving the DNA testing results related to Nyamboki, he was excluded as a contributor of the

semen found on the swabs taken from the complainant. Irechukwu's DNA sample was also sent to the UNT Health Science Center to be compared to the DNA of the semen found on the swabs taken from the complainant during the sexual assault examination. The DNA testing results for Irechukwu excluded him as a contributor of the semen found on the swabs taken from the complainant. Appellant's DNA sample was sent to the UNT Health Science Center to be compared to the DNA of the semen found on the swabs taken from the complainant. After receiving the DNA testing results for appellant, O'Rear obtained an arrest warrant for appellant.

Farah Plopper, a forensic DNA analyst at the UNT Health Science Center, Center for Human Identification, testified that her laboratory is involved in DNA testing and that it is not uncommon for a law enforcement agency to provide the laboratory with an unknown sample for DNA testing. It is also not uncommon for a law enforcement agency to provide the laboratory with a DNA sample from a known individual to test against an unknown sample to determine if the DNA is a match or if the known individual is a DNA contributor to the unknown sample. Plopper explained that when the laboratory receives a sample for DNA testing, such as a swab, the first step is DNA extraction. The laboratory then performs a quantification step to determine "how much human DNA [is] able to [be] recover[ed]" from the sample. Finally, the laboratory performs an amplification step during which "exact copies of the DNA" are made. After those three steps are complete, the sample is

loaded "onto an instrument called a genetic analyzer," the "data runs through that instrument," and "a computer . . . tak[es] all that information and translat[es] it into a format" that Plopper can interpret.

As to the complainant, Plopper testified that she tested the complainant's sexual assault kit, which included the vaginal, vulvar, anal, perianal, and buccal swabs taken from the complainant during her sexual assault examination. Plopper also noted that the laboratory received known DNA samples from appellant, Nyamboki, and Irechukwu. After DNA testing was complete, Plopper completed her "Forensic DNA Report," a copy of which the trial court admitted into evidence, over appellant's objection, as State's Exhibit 15.

In discussing the results of the DNA testing, Plopper stated that she was able to confirm the presence of semen on the perianal and anal swabs taken from the complainant during her sexual assault examination. Plopper explained that whenever semen is observed in a sample, a special kind of DNA extraction called a differential extraction is performed. This creates two different extracts—one that contains non-sperm or epithelial cells and another that contains sperm cells.

As to the anal swabs, the complainant was found to be a DNA contributor to the epithelial fraction, which would be expected. And both Nyamboki and Irechukwu were excluded as DNA contributors to the sperm fraction. However, appellant could not be excluded as a contributor of the DNA found in the sperm

fraction of the anal swabs.[5] Plopper stated that the "DNA profile from the sperm fraction of the anal swabs ha[d] an estimated frequency of occurrence of . . . one in approximately 140 septillion African-American individuals." This statistic indicates that the DNA profile observed in the sperm fraction from the anal swabs is rare.

As to the perianal swabs, Plopper testified that the complainant was found to be a DNA contributor to the epithelial fraction and appellant could not be excluded as a minor contributor[6] to the DNA found in the epithelial fraction.[7] Nyamboki and Irechukwu were excluded as DNA contributors to the sperm fraction, but appellant could not be excluded as a DNA contributor to the sperm fraction of the perianal swabs. Plopper noted that the "sperm fraction of the sample of the DNA profile [from the perianal swabs], ha[d] an estimated frequency of occurrence of . . . [o]ne in approximately 32 octillion African-American individuals." And Plopper explained that the "DNA profile from th[e] sperm fraction [of the perianal swabs] was the same as the DNA profile that [was] obtained from" appellant. The statistic

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5 State's Exhibit 15 states that "the data indicate[s] with a high degree of confidence that [appellant] is the source of the . . . contributor DNA from the sperm fraction of" the anal swabs.

6 Plopper explained when there is a mixture of DNA, and thus more than one DNA contributor, a "major contributor" contributes more DNA to the sample than the "minor contributor."

7 State's Exhibit 15 states that Nyamboki and Irechukwu were excluded as contributors for the epithelial fraction from the perianal swabs.

indicates that the DNA profile observed in the sperm fraction from the perianal swabs is rare.[8]

Admission of Evidence

In his first issue, appellant argues that that trial court erred in admitting State's Exhibit 15, the Forensic DNA Report, because the trial court's admission of the exhibit violated appellant's Sixth Amendment right "to be confronted with the witnesses against him." *See* U.S. CONST. amend. VI.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). When considering a trial court's decision to admit evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996) (internal quotations omitted). We will uphold a trial court's evidentiary ruling if it is correct on any theory of law applicable to that ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

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[8] Appellant testified in his defense and denied sexually assaulting the complainant.

If the erroneous admission of evidence constitutes a violation of constitutional rights, we still perform a harm analysis and must reverse a judgment of conviction unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. *See* TEX. R. APP. P. 44.2(a); *Henriquez v. State*, 580 S.W.3d 421, 429 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd); *Gutierrez v. State*, 516 S.W.3d 593, 599 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *see also Lee v. State*, 418 S.W.3d 892, 899 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) ("A Confrontation Clause violation is constitutional error that requires reversal unless we conclude beyond a reasonable doubt that the error was harmless."). The critical inquiry is not whether the evidence supported the verdict absent the erroneously admitted evidence, but rather "the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007); *see also Henriquez*, 580 S.W.3d at 429. We must "calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence." *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001). While our review must focus on the error and its effect, "the presence of other overwhelming evidence that was properly admitted which supports the material fact to which the inadmissible evidence was directed may be an important factor in the evaluation of harm." *Wall v. State*, 184 S.W.3d 730, 746 (Tex. Crim. App. 2006). In determining if the constitutional error may be declared harmless beyond a

reasonable doubt, we may consider: (1) how important the out-of-court statement was to the State's case; (2) whether the out-of-court statement was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and (4) the overall strength of the State's case. *Scott*, 227 S.W.3d at 690; *Gutierrez*, 516 S.W.3d at 599.

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *see also Sohail v. State*, 264 S.W.3d 251, 258 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) ("A defendant has a constitutional right to confront and cross-examine the witnesses against him."). The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him and the right to conduct cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see also Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (Confrontation Clause "guarantees [a] defendant a face-to-face meeting with witnesses appearing before the trier of fact"). The Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless that witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004); *Russeau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005).

Whether an absent witness's statement is testimonial or nontestimonial is a threshold issue for the court to decide. *See Woods v. State*, 152 S.W.3d 105, 113–14 (Tex. Crim. App. 2004); *see also Woodall v. State*, 336 S.W.3d 634, 642 (Tex. Crim. App. 2011) (holding, in reviewing Confrontation Clause challenge, appellate courts must "first determine whether the Confrontation Clause is implicated," i.e., whether out-of-court statement made by witness absent from trial is testimonial in nature). And whether a statement is testimonial or nontestimonial is a constitutional legal question that we review de novo. *Wall*, 184 S.W.3d at 742. Testimonial statements include those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App. 2015) (internal quotations omitted); *see also Williams v. State*, 513 S.W.3d 619, 637 (Tex. App.—Fort Worth 2016, pet. ref'd).

In the context of an expert testifying about a laboratory report, it is a violation of a defendant's right to confrontation for a "surrogate" witness to testify to the conclusions made in another analyst's laboratory report because the report is considered a testimonial statement of the analyst who performed the tests when compiling the report. *See Bullcoming v. New Mexico*, 564 U.S. 647, 652, 655–63 (2011); *Paredes*, 462 S.W.3d at 517–19 ("The admission of a lab report created solely by a non-testifying analyst, without calling that analyst to sponsor it, violates

the Confrontation Clause. Doing so deprives a defendant of his opportunity to cross-examine the non-testifying expert about the conclusions contained in the report and how the non-testifying expert arrived at those conclusions."); *Burch v. State*, 401 S.W.3d 634, 640 (Tex. Crim. App. 2013); *see also Henderson v. State*, No. 02-15-00397-CR, 2017 WL 4172591, at *17 (Tex. App.—Fort Worth Sept. 21, 2017, pet. ref'd) (mem. op., not designated for publication); *Nelson v. State*, No. 02-16-00184-CR, 2017 WL 3526340, at *11 (Tex. App.—Fort Worth Aug. 17, 2017, no pet.) (mem. op., not designated for publication). But when an expert testifies to her own opinion or conclusion, even when that conclusion or opinion is based on the laboratory work of others, there is no violation of the Confrontation Clause. *Paredes*, 462 S.W.3d at 512–19; *see also Henderson*, 2017 WL 4172591, at *17; *Nelson*, 2017 WL 3526340, at *11.

State's Exhibit 15, the Forensic DNA Report, is authored by Plopper, the forensic DNA analyst who testified at trial. Plopper explained that when her laboratory receives a sample for DNA testing, such as a swab, the first step is DNA extraction. The laboratory then performs a quantification step to determine "how much human DNA [is] able to [be] recover[ed]" from the sample. Finally, the laboratory performs an amplification step during which "exact copies of the DNA" are made. After those three steps are complete, the sample is loaded "onto an instrument called a genetic analyzer," the "data runs through that instrument," and

"a computer . . . tak[es] all that information and translat[es] it into a format" that Plopper can interpret. Plopper testified that she tested the complainant's sexual assault kit, which included the vaginal, vulvar, anal, perianal, and buccal swabs taken from the complainant during her sexual assault examination. Plopper also stated that her laboratory received DNA samples from appellant, Nyamboki, and Irechukwu. These "known samples" were tested by an evidence technologist at Plopper's laboratory. In other words, for the DNA samples provided by appellant, Nyamboki, and Irechukwu, an evidence technologist from Plopper's laboratory did the extraction, quantification, and amplification steps on those samples. But Plopper then took the "data from the genetic analyzer," which had translated the information into a format that Plopper could interpret, and conducted the analysis on the "known samples," meaning that she developed the DNA profiles for the known samples taken from appellant, Nyamboki, and Irechukwu. After Plopper completed her analysis—comparing the DNA samples from appellant, Nyamboki, and Irechukwu to the unknown DNA found on the various swabs taken from the complainant during her sexual assault examination—Plopper wrote her report. Plopper stated: "I did all my own independent analysis of every item that's in th[e] report."

Here, Plopper performed the DNA analysis and determined whether or not appellant, Nyamboki, and Irechukwu could be excluded as contributors of the unknown DNA found in the perianal and anal swabs taken from the complainant

during her sexual assault examination. Plopper testified to her own independent opinions and conclusions at trial. *See Whitfield v. State*, 524 S.W.3d 780, 786–88 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (DNA analyst and supervisor performed crucial analysis of raw DNA data and testified to her own conclusions, without analyst's independent analysis, "the raw, computer-generated data . . . that the . . . instrument produced st[ood] for nothing on [its] own" (second alteration in original) (internal quotations omitted)); *see also Henderson*, 2017 WL 4172591, at *17–18. The fact that Plopper, in her analysis, relied on data generated by an evidence technologist at her laboratory does not render her a "surrogate" witness of a non-testifying analyst and does not violate appellant's right to confrontation under the Sixth Amendment. *See Paredes*, 462 S.W.3d at 511–19; *Garrett v. State*, 518 S.W.3d 546, 555 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *see also Henderson*, 2017 WL 4172591, at *17–18; *Nelson*, 2017 WL 3526340, at *11–13. Appellant had the opportunity to cross-examine Plopper as to her opinions and conclusions related to the DNA testing that was performed in his case. *See Garrett*, 518 S.W.3d at 555 ("[B]ecause [witness] independently analyzed the raw DNA data and offered his own opinion concerning the comparison of the DNA profiles, and he testified and was subject to cross-examination, the admission of his testimony and his lab report, even in the absence of testimony from [the non-testifying analysts], d[id] not violate the Confrontation Clause.").

We conclude that the trial court's admission of State's Exhibit 15, the Forensic DNA Report, did not violate appellant's Sixth Amendment right "to be confronted with the witnesses against him." Thus, we hold that the trial court did not err in admitting the exhibit into evidence.

We overrule appellant's first issue.

Jury Charge

In his second issue, appellant argues that the trial court erred in instructing the jury during the punishment phase of trial because the trial court's charge "included [a] 'good time' parole instruction," appellant is not "eligible to accumulate good time," and appellant's "right to due process and due course of law [was] violated" as a result of the trial court's misleading and confusing instruction.

We review complaints of jury-charge error under a two-step process. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). First, we must determine whether error exists in the trial court's charge. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013). Second, if there is error, the court must determine whether the error caused sufficient harm to require reversal of the conviction. *Id.* 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 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.

After the jury found appellant guilty of two "counts" of the offense of aggravated sexual assault of an elderly or disabled person and heard evidence during the punishment phase of trial, the trial court, in its charge to the jury, included this instruction about good conduct time and parole law:

> Under the law applicable in this case, the [d]efendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the [d]efendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the [d]efendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this Defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular

> Defendant. You are not to consider the manner in which the parole law may be applied to this particular Defendant.

Texas Code of Criminal Procedure article 37.07, section 4(a) requires the trial court to instruct the jury regarding the existence and mechanics of parole law and good conduct time. *See* TEX. CODE CRIM. PROC. art. 37.07, § 4(a); *see also Luquis v. State*, 72 S.W.3d 355, 360 (Tex. Crim. App. 2002); *Williams v. State*, No. 02-14-00194-CR, 2014 WL 7345139, at *1 (Tex. App.—Fort Worth Dec. 23, 2014, pet. ref'd) (mem. op., not designated for publication); *Sanders v. State*, 255 S.W.3d 754, 765 (Tex. App.—Fort Worth 2008, pet. ref'd). And, as required, the trial court informed the jury that it could not consider the extent to which good conduct time may be awarded to or forfeited by appellant or the manner in which the parole law may be applied to appellant. *See* TEX. CODE CRIM. PROC. art. 37.07, § 4(a); *see also Luquis*, 72 S.W.3d at 360; *Williams*, 2014 WL 7345139, at *1. The overall purpose of these instructions from the trial court was to inform the jury of the concepts as a general proposition, but the instructions clearly prohibited the jury from considering how the concepts of good conduct time and parole might be applied to appellant. *See Luquis*, 72 S.W.3d at 360; *Guerrero v. State*, No. 02-11-00421-CR, 2012 WL 5258700, at *4 (Tex. App.—Fort Worth Oct. 25, 2012, no pet.) (mem. op., not designated for publication).

Persons convicted of certain enumerated offenses, including the offense of aggravated sexual assault, are not eligible for release on mandatory supervision,

regardless of how much good conduct time they might accrue and their good conduct time does not make them eligible for parole any sooner than they would be without the good time credits. *See* TEX. GOV'T CODE ANN. §§ 508.145(d), 508.149(a); TEX. PENAL CODE ANN. § 22.021; *see also Guerrero*, 2012 WL 5258700, at *4; *Sanders*, 255 S.W.3d at 765. Appellant, because he was convicted of two "counts" of the offense of aggravated sexual assault of an elderly or disabled person, is not eligible for release on mandatory supervision, regardless of how much good time he might accrue, nor does his good conduct time make him eligible for parole sooner than he would be without good conduct time credits. *See* TEX. GOV'T CODE ANN. §§ 508.145(d), 508.149(a); TEX. PENAL CODE ANN. § 22.021; *see also Luquis*, 72 S.W.3d at 362. Appellant thus asserts that the inclusion of the above instruction about good time conduct and parole law violated his right to due process and due course of law because the instruction given by the trial court did not apply to him. *Cf. Williams*, 2014 WL 7345139, at *1 (raising same issue); *Sanders*, 255 S.W.3d at 765–66 (defendant asserted instruction on good conduct time was misstatement of law as applied to him and thus violated due process rights).

The Texas Court of Criminal Appeals has directly addressed this issue and found no violation of a defendant's right to due process or due course of law.[9] *See*

[9] In his brief, appellant notes the Court of Criminal Appeals's ruling in *Luquis v. State*, 72 S.W.3d 355 (Tex. Crim. App. 2002) and states that he raises his second issue in our Court solely to preserve it for further review.

Luquis, 72 S.W.3d at 364–68; *see also Williams*, 2014 WL 7345139, at *1. In *Luquis*, the Court of Criminal Appeals acknowledged that the instruction dictated by the Texas Code of Criminal Procedure may be inapplicable to some defendants. 72 S.W.3d at 363. But it construed Texas Code of Criminal Procedure article 37.07, section 4(a) to be an absolute command that the good conduct time and parole law instruction be given to the jury. *Id.* Thus, a trial court that gives the instruction does not commit error. *Id.* Further, the Court of Criminal Appeals held that the required instruction under article 37.07, section 4(a), as a whole, is not so misleading as to deny a defendant due process or due course of law. *Id.* at 364–68.

The Fort Worth Court of Appeals[10] has also definitively held that the trial court's inclusion of the mandatory language of Texas Code of Criminal Procedure article 37.07, section 4(a) in its charge to the jury, even when not applicable to a particular defendant, does not violate the defendant's right to due process or due course of law. *See Sanders*, 255 S.W.3d at 765–66; *Cagle v. State*, 23 S.W.3d 590, 593–94 (Tex. App.—Fort Worth 2000, pet. ref'd); *see also Guerrero*, 2012 WL 5258700, at *4–5; *Bishop v. State*, No. 2-03-443-CR, 2005 WL 1189317, at *7–8 (Tex. App.—Fort Worth May 19, 2005, pet. ref'd) (mem. op., not designated for publication) ("[V]arious constitutional challenges to the mandated parole charge [required by article 37.07, section 4(a)] have been rejected in Texas courts."),

[10] *See* TEX. R. APP. P. 41.3.

The trial court's instruction to the jury tracked the language in Texas Code of Criminal Procedure article 37.07, section 4(a). *See Bishop*, 2005 WL 1189317, at *8. Thus, we hold that the trial court did not err in instructing the jury during the punishment phase of trial as statutorily required. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a).

We overrule appellant's second issue.

Conclusion

We affirm the judgments of the trial court.

Julie Countiss
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.

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