

Affirmed and Memorandum Opinion filed March 1, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-00863-CR

JAMES RIVERA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1442738**

M E M O R A N D U M O P I N I O N

Appellant was convicted of aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021 (Vernon 2015). Appellant seeks reversal of the trial court's judgment on grounds that (1) the trial court erred in not instructing the jury that its verdict must be unanimous as to a single incident of assault; and (2) this error caused egregious harm. We affirm.

BACKGROUND

Appellant was indicted for aggravated sexual assault of a child. The indictment alleged that on or about March 11, 2007, appellant caused the penetration of the female sexual organ of A.S., a person younger than fourteen years of age, by placing his finger in her female sexual organ. In opening argument the State asserted the offense happened on two separate occasions. A.S. testified that appellant penetrated her with his finger three times, but she only described the first incident with specificity.

A.S. remembered that during the first incident she was living at a particular address and was in fifth or sixth grade. A.S. was recalled to the stand to clarify the date of the first incident and identified the middle school she was attending. The State submitted A.S.'s school records showing she attended that school from January 3, 2007, to May 24, 2007, which includes the date charged in the indictment.

A.S. described the second incident as happening at the same house but while she was attending a different middle school. She attended that school before and after the age of fourteen and did not move out of the house until she was fourteen. She did not give details about a third incident.

Appellant testified that the events in question never occurred.

The jurors were instructed to consider offenses not charged only if they believed beyond a reasonable doubt the defendant committed such offenses, and only for specified purposes.¹ The charge included this statement regarding

¹ Under the jury charge, other offenses believed beyond a reasonable doubt could be considered in determining “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the defendant . . . and for no other purpose.” Other crimes, wrongs, or acts committed against A.S. and believed beyond a reasonable doubt could be considered for “(1) the state of mind of the defendant and the child; and (2) the previous and

unanimity: “After you retire to the jury room, you should select one of your members as your Foreman. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto and signing the same as Foreman.”

The jury found appellant guilty, sentenced him to 65 years in the Texas Department of Criminal Justice Institutional Division, and imposed a \$10,000 fine. Appellant filed timely notice of appeal.

ANALYSIS

Appellant’s first point of error is that the trial court erred in not instructing the jury its verdict must be unanimous as to a single incident of assault. Appellant’s second point of error is that the absence of a unanimity instruction caused him egregious harm. We assume, without deciding, there was error in the instruction, but hold appellant did not suffer egregious harm.

I. Standard of Review

We review claims of charge error under a two-pronged test. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh’g); *Rolle v. State*, 367 S.W.3d 746, 757 (Tex. App.—Houston [14th Dist.] 2012, pet. ref’d). We first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Rolle*, 367 S.W.3d at 757. If error exists, we then evaluate the harm caused by that error. *Ngo*, 175 S.W.3d at 743; *Rolle*, 367 S.W.3d at 757. The degree of harm required for reversal depends on whether error was preserved in the

subsequent relationship between the defendant and child, and for no other purpose.” Offenses presented that were committed against other children under seventeen that were believed beyond a reasonable doubt could be considered “for any bearing the evidence ha[d] on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.”

trial court. If error was not preserved, it must be “fundamental” error and requires reversal only if it was so egregious and created such harm that the defendant “has not had a fair and impartial trial.” *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) (quoting *Almanza*, 686 S.W.2d at 171); *Rolle*, 367 S.W.3d at 757. “An egregious harm determination must be based on a finding of actual rather than theoretical harm.” *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015) (quoting *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011)).

II. Error

The jury charge was not objected to at trial; therefore, any charge error was unpreserved. *See* Tex. R. App. P. 33.1.

Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must “agree upon a single and discrete incident that would constitute the commission of the offense alleged.” *Cosio*, 353 S.W.3d at 771 (quoting *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007)).

[N]on-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions. Each of the multiple incidents individually establishes a different offense or unit of prosecution. The judge’s charge, to ensure unanimity, would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented.

Id. at 772.

In *Cosio*, the defendant was convicted by jury of two counts of aggravated sexual assault of a child and two counts of indecency with a child by contact. *Id.* at 770. Each count was supported by multiple instances of criminal conduct. *Id.* The Court of Criminal Appeals affirmed the court of appeals’ holding that the trial court erred by failing to require unanimous verdicts, but reversed the finding that

the defendant was egregiously harmed. *Id.* at 778. The court found that it was “highly likely that the jury’s verdicts . . . were, in fact, unanimous” and thus actual harm was not shown. *Id.*

In *Arrington*, a jury convicted the defendant of five counts of aggravated assault and one count of indecency with a child. *Arrington*, 451 S.W.3d at 838. As in *Cosio* the evidence included more than one instance of sexual contact to support each count. *Id.* at 839. The court of appeals held the lack of a unanimity instruction erroneously permitted a non-unanimous verdict, and the defendant was egregiously harmed. *Id.* at 839–40. The Court of Criminal Appeals agreed there was error but reversed as to the finding of harm. *Id.* at 845.

In this case, A.S. testified about two incidents of criminal conduct that possibly met the elements of the charge but did not testify with certainty that she was under fourteen at the time of the second incident. The State argues that “no rational juror could have convicted on the vague reference to two other incidents of penetration.” The State never argued that A.S. was under fourteen at the time of the third incident, but did assert in opening argument that she was under fourteen during the first two incidents. In closing the State focused on the details of the first incident, but followed with, “[a]nd that was one of the three times that she told you that he actually put his fingers inside her.”

A.S. testified about the timing of the second incident as follows:

Q. [Prosecutor] And the second time that he put his fingers inside of you do you remember where you were going to school when that happened?

A. [A.S.] I think [different school than first incident].

Q. And what grade were you in then?

A. I went there from sixth to eighth grade, but I know I was in the brown house all those three years.

Q. Where did you move after the brown house?

A. [A.S. gives address of brown house then corrects herself to a similar address on the same street.]

Q. How old were you when you moved into that house?

A. Fourteen.

On careful review of the testimony, it is not clear that A.S. was under fourteen at the time of the second incident.

The charge for the guilt-innocence portion of trial mentioned unanimity once. This language does not apprise a jury that it must be unanimous as to a single offense if multiple incidents could support conviction. *Arrington*, 451 S.W.3d at 841; *Cosio*, 353 S.W.3d at 773. The State originally argued that there was more than one offense that could support conviction, but in closing focused on the first incident. Because the State presented some evidence of two incidents that possibly met all the elements of the charged offense, we assume without deciding that the omission of a more specific instruction on unanimity was erroneous and turn to the harm prong.

III. Harm

Reversal is not warranted based on appellant's charge complaint because the record does not establish that appellant suffered egregious harm.

A reviewing court considers harm caused by charge error in the context of (1) the entire charge; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *Arrington*, 451 S.W.3d at 840.

A. The Entire Charge

As noted in *Arrington* and *Cosio*, when more than one incident of criminal conduct could be relied on for conviction, a generic instruction on unanimity is not sufficient to apprise the jury of the unanimity requirement. *Id.* at 841; *Cosio*, 353 S.W.3d at 773. Because the charge had only one reference to unanimity, this factor weighs in favor of a finding of egregious harm. *See Arrington*, 451 S.W.3d at 841.

B. The State of the Evidence

Under this prong we determine “whether the evidence made it more or less likely that the jury charge caused appellant actual harm.” *Id.* Viewing the record in totality, this factor weighs against a finding of egregious harm. *See id.* Appellant maintained that no sexual assaults occurred. A.S. was the only one to testify with first-hand knowledge about the offense charged. To convict, the jury necessarily credited A.S.’s testimony and discredited appellant’s testimony. *See id.* at 844. In *Arrington*, appellant also denied all accusations, but the jury convicted, “clearly credit[ing]” the victim’s story. *Id.* As in *Arrington*, if the jury “believed appellant rather than [the victim], it would have acquitted him of all charges.” *Id.* Accordingly, this factor weighs against a finding of egregious harm. *Id.*

C. Arguments of Counsel

Under this prong we determine “whether any statements made by the State, appellant, or the court during trial exacerbated or ameliorated error in the charge.” *Id.* In *Ngo*, the Court of Criminal Appeals found egregious harm caused by lack of a unanimity instruction when the jury was repeatedly told that its verdict need not be unanimous. *Ngo*, 175 S.W.3d at 751–52. There was no such statement in this case. The court emphasized during voir dire that the verdict in criminal cases must be unanimous. The State said during opening that appellant committed the offense

twice when A.S. was under fourteen, but in closing identified March 2007 as the approximate date of the offense and focused on the details of the first incident. These statements helped ameliorate any uncertainty that may have existed regarding multiple offenses presented because the evidence showed only one incident occurred around that date. Because the court informed the jurors about the unanimity requirement, and neither counsel for the State nor appellant contradicted this assertion, this factor weighs against a finding of egregious harm. *See Arrington*, 451 S.W.3d at 844 (finding factor neutral when there was no mention of unanimity by the court or counsel).

D. Other Relevant Information

Appellant does not argue and we do not find that any other factor weighed in favor or against a finding of egregious harm.

E. Consideration of the Four Factors

As in *Cosio* and *Arrington*, the only factor in favor of a finding of egregious harm is the lack of a sufficient unanimity instruction. *Id.* at 845; *Cosio*, 353 S.W.3d at 777–78. In *Cosio*, the court concluded that acceptance of the appellant’s defense—that he did not commit any of the offenses—would have resulted in acquittal, stating “[i]t is thus highly likely that the jury’s verdicts . . . were, in fact, unanimous.” *Id.* at 778. A similar analysis applies here. Appellant also denied all accusations, and the jury convicted. It is highly likely that despite the lack of unanimity instruction, the verdict was in fact unanimous. Appellant has not shown a lack of unanimity in the verdict. Thus, appellant has not shown actual harm as would require reversal. *See id.*

CONCLUSION

Having held that if the court erred appellant was not egregiously harmed, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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