Affirmed and Opinion, Concurring, and Dissenting Opinions filed March 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00502-CR

JOSEPH ANTHONY SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1336966

DISSENTING OPINION

I agree with Justice Jewell that the trial court erred by submitting its punishment-phase charge with a guilt-phase instruction. I write separately, however, because I cannot join Justice Jewell's opinion in full. Unlike Justice Jewell, I cannot agree that there are situations in which guilt-phase instructions may be given in punishment-phase charges. I would apply a bright-line rule that guilt-phase instructions should never appear in punishment-phase charges.

I also cannot agree with Justice Jewell that the trial court's charge error was harmless. I would conclude that the error resulted in some harm, and I would reverse the trial court's judgment and remand for a new hearing on punishment only. Because the court does not, I respectfully dissent.

I. The trial court erred by giving the challenged instruction.

Over defense counsel's objection, the trial court submitted the following instruction in its punishment charge to the jury:

> Voluntary intoxication does not constitute a defense to the commission of a crime. "Intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

The first sentence of this instruction tracks the language of Section 8.04(a) of the Texas Penal Code, and the second sentence tracks the language of Section 8.04(d). Defense counsel argued that the entire instruction was inappropriate:

> We object to the submission of [the voluntary] intoxication charge that's been submitted by the prosecution and the Court has included. We take the position it's not appropriate in the punishment stage of the trial. It might be appropriate in guilt/innocence, but we never took the position that [appellant] was somehow incapacitated in such a way that he didn't reach the mens rea level to commit the crime.

Counsel was correct. In *Taylor v. State*, the Court of Criminal Appeals held that "Subsection (a) of section 8.04 is directed to the guilt/innocence phase of trial." *See Taylor v. State*, 885 S.W.2d 154, 156 (Tex. Crim. App. 1994). The Court also determined that Section 8.04(a) was not a "mitigation provision." *Id.* at 156 n.4. Although the Court did not speak directly to the exact situation presented here, the effect of *Taylor* should be clear enough: Because the punishment phase is about sentencing and not guilt or innocence, an instruction under Section 8.04(a) does not belong in the punishment charge.

The State argues that the challenged instruction was appropriate because the instruction applied to evidence of an extraneous offense, which was introduced for the first time during appellant's trial on punishment. That explanation is erroneous for three reasons.

First, the State requested the challenged instruction under a belief that the instruction would apply to the charged offense (aggravated robbery), not the extraneous offense (capital murder).[1]

Second, there is no language in the instruction expressly limiting its application to just the extraneous offense.

Third, even if there were limiting language, the instruction would be irrelevant because the instruction is only useful when deciding the guilt of the defendant, a question that is obviously not decided during the punishment phase of trial, even when extraneous offenses are at play.

The Court of Criminal Appeals emphasized this final point in *Haley v. State*, 173 S.W.3d 510 (Tex. Crim. App. 2005). In that case, the defendant complained about evidence of an extraneous offense, which had been admitted during the punishment phase. *Id.* at 511–12. The defendant argued that the evidence should have been excluded because it did not establish that she was criminally responsible as a party to the extraneous offense. *Id.* at 512. The Court rejected that argument, explaining that the jury did not need to determine the defendant's criminal responsibility with respect to the extraneous offense: "It is irrelevant whether the conduct the offering party is attempting to prove is, or can be characterized, as an offense under the Texas Penal Code." *Id.* at 514–15. "Unlike the guilt-innocence

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[1] During the charge conference, the State explained its request as follows: "We simply ask that this instruction be included so that the jury doesn't recognize or excuse the defendant's behavior on the aggravated robbery. I do recognize that Dr. Rustin can easily testify to the idea that this is mitigation, that [appellant is] on these substances at some point. But this saves us from any concerns over the aggravated robbery in excusing his behavior by having this charge."

phase, the question at punishment is not whether the defendant has committed a crime, but instead what sentence should be assessed." *Id.* at 515. "Whereas the guilt-innocence stage requires the jury to find the defendant guilty beyond a reasonable doubt of each element of the offense, the punishment phase requires the jury only find that these prior [extraneous] acts are attributable to the defendant beyond a reasonable doubt." *Id.*

We recently applied *Haley* in a case of our own. In *Gomez v. State*, the issue was whether the trial court had erred by denying a request for a self-defense instruction in the punishment charge. *See Gomez v. State*, 380 S.W.3d 830, 837–38 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). The defendant believed that he was entitled to the instruction because it applied to evidence of two extraneous killings. *Id.* We disagreed: "To prove an extraneous offense at punishment, the State is only required to prove beyond a reasonable doubt a defendant's involvement in the bad act: a finding of guilt for a crime is not required." *Id.* at 839. If, under *Gomez*, the defendant is not entitled to a guilt-phase instruction during the punishment-phase of trial, then neither is the State.

We see echoes of *Haley* in other contexts too. For example, we do not review the sufficiency of the evidence supporting an extraneous offense. *See Palomo v. State*, 352 S.W.3d 87, 94 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). The reason is simple: "there is no actual finding by the jury that the defendant committed the extraneous offense." *Id.* at 95; *see also Bible v. State*, 162 S.W.3d 234, 246–47 (Tex. Crim. App. 2005) (no need to consider whether there is sufficient proof to corroborate evidence of an extraneous offense from a confession); *McClure v. State*, 269 S.W.3d 114, 118 (Tex. App.—Texarkana 2008, no pet.) (no need to consider whether there is sufficient proof to corroborate evidence of an extraneous offense from an accomplice witness).

Similarly, we do not give the jury a special verdict form, listing the elements of an unadjudicated offense. *See Matchett v. State*, 941 S.W.2d 922, 937 (Tex. Crim. App. 1996). Nor do we say that jeopardy attaches whenever evidence of an unadjudicated offense is admitted during a punishment hearing. *See Ex parte Broxton*, 888 S.W.2d 23, 28 (Tex. Crim. App. 1994).

Justice Jewell would hold that tailoring language may justify the submission of a guilt-phase instruction in a punishment-phase charge if, for instance, the tailoring language prevents confusion by limiting the instruction to particular evidence or a defense. But the best way to prevent confusion is simply to omit the guilt-phase instruction in the first place because it does not belong. The jury does not (and cannot) make a finding of guilt during the punishment of a trial, and so there is no reason for the trial court to include in its punishment charge an instruction that can only be applied properly when deciding the guilt of the defendant.

II. The trial court's error resulted in some harm.

When error in the charge was the subject of a timely objection, as it was here, the judgment must be reversed if the error was "calculated to injure the rights of [the] defendant." *See* Tex. Code Crim. Proc. art. 36.19. This means "no more than that there must be *some* harm to the accused from the error." *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). "In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless." *Id.*

Harm is assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Id.* I examine each of these factors in turn.

The Entire Jury Charge. There are eleven pages worth of instructions in the trial court's punishment charge. The first five pages address the punishment range, the availability of community supervision, and the law regarding credits for good time and parole. All of these subjects flow necessarily from the conviction for the charged offense, not the admission of the extraneous-offense evidence.

Then, on the sixth page, the challenged instruction appears. The entire page is reserved for the instruction, and there is no text signaling that the instruction is limited to just the extraneous offense.

After the challenged instruction, there is an instruction saying that appellant's mere presence at the scene of the offense is insufficient to conclude that he committed an offense beyond a reasonable doubt. Although this is also a guilt-phase instruction, appellant does not complain about it.

The remaining pages contain boilerplate instructions about extraneous offenses, the defendant's right to not testify, the burden of proof, and the requirement of a unanimous verdict.

Justice Jewell argues that the jury would have likely construed the challenged instruction as pertaining to just the extraneous offense, but I would say that this construction is far from likely based on the placement of the instruction within the charge. The challenged instruction is featured on its own page, appearing after the discussion of the charged offense, before the discussion of the extraneous offenses, and without any sort of language limiting its application to one or the other. The possibility for confusion was significant. The jury could have just as easily concluded that the challenged instruction applied to the offense for which appellant was being sentenced. *Cf. Reeves v. State*, 420 S.W.3d 812, 819 (Tex. Crim. App. 2013) (noting that "the physical location of the [erroneous instruction] magnified its harm").

Justice Jewell also argues that any confusion created by the challenged instruction was cured by a later instruction that the jury should consider all of the evidence. But the problem is not what evidence the jury was allowed to consider; the problem was *how* the jury was instructed to consider the evidence. The challenged instruction singled out the evidence of appellant's addiction and then told the jury that his addiction was not a "defense" if appellant voluntarily intoxicated himself. That language was harmful because it effectively instructed the jury that evidence of addiction should not be treated as mitigating.

The plurality opinion by Chief Justice Frost acknowledges that the challenged instruction may have been "unnecessary," but would still hold that the challenged instruction was not erroneous because it was an accurate statement of law. This also misses the point. An "unnecessary" instruction can amount to an improper comment on the weight of the evidence. *See Brown v. State*, 122 S.W.3d 794, 801 (Tex. Crim. App. 2003). And a charge can be erroneous even if it perfectly tracks the language of a statute. *E.g.*, *Navarro v. State*, 469 S.W.3d 687, 698–700 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

Reviewing courts should not limit their focus to just the words that appear in an instruction. They must also determine the likely impact of those words. And here, the problem with the challenged instruction is that it unfairly singled out the evidence offered by appellant in mitigation. *See Bartlett v. State*, 270 S.W.3d 147, 152 (Tex. Crim. App. 2008) ("Even a seemingly neutral instruction may constitute an impermissible comment on the weight of the evidence because such an instruction singles out that particular piece of evidence for special attention."); *Santos v. State*, 961 S.W.2d 304, 306 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) ("Even though the instruction constitutes an accurate statement of the law, it magnifies a particular fact giving unfair emphasis to that fact.").

The Evidence. Appellant called a single defense witness during punishment, Dr. Terry Rustin, who testified about addictions to Xanax. Dr. Rustin explained that Xanax is a type of sedative that can reduce personal inhibitions and encourage people to act in ways they might otherwise not for fear of being punished.

Dr. Rustin testified that appellant began taking Xanax without a prescription when he was fourteen years old, and that he regularly exceeded the recommended dosage as he grew older and more addicted to the drug. There was evidence that appellant was under the influence of Xanax when he committed the charged offense and the extraneous offense.

Defense counsel did not offer Dr. Rustin's testimony in an effort to excuse appellant's behavior (i.e., to eliminate appellant's criminal responsibility) or to show that appellant was temporarily insane because he had been under the influence of Xanax. Rather, counsel offered this testimony merely to provide context and explanation for appellant's behavior.

Evidence of drug addiction can be relevant in the jury's assessment of punishment. *See Ex parte Smith*, 309 S.W.3d 53, 63 (Tex. Crim. App. 2010) ("His evidence of drug addiction, poverty, and a crime-ridden neighborhood was at the heart of his mitigation theory."). Appellant certainly needed some evidence in mitigation because the State's evidence portrayed him in a deeply negative light.

The State produced evidence that appellant killed a man for his wallet; that he assaulted his own friend because he perceived that his friend was encroaching on his girlfriend; and that he beat an inmate, to the point of rendering the inmate unconscious, just so that he could get a private jail cell. These are just the extraneous bad acts. When the charged offense is also considered, the State's evidence depicted appellant as violent, depraved, and wholly unsympathetic.

The only evidence offered to counter this depiction was the evidence of appellant's problem with addiction. But the trial court's erroneous charge negated

the effect of that evidence by confusing the issue on punishment—essentially, by instructing the jury that the addiction was not a "defense" because appellant voluntarily intoxicated himself. The erroneous charge undermined appellant's sole defensive theory in punishment. *See Reeves*, 420 S.W.3d at 820–21 ("It is also relevant to the harm analysis that the erroneous instruction . . . undermined appellant's sole defense.").

The Arguments of Counsel. Defense counsel tried to contain the effect of the erroneous instruction. During closing arguments, counsel repeatedly argued that appellant's Xanax addiction was not an "excuse" for his behavior. Counsel also encouraged the jury to consider appellant's addiction as "mitigation."

Perhaps unsurprisingly, the prosecutor treated the erroneous instruction as a guilt-phase instruction, emphasizing the voluntary component of appellant's addiction:

> There is no—I repeat—no mitigation for his activity. He's the one that chose to put that Xanax in his mouth. He didn't have a prescription for it. He chose to take it. He now must face the consequences of those actions.

Because the prosecutor opted to close last, this was the final impression imparted to the jury—a view based on an erroneous instruction. That view increased the likelihood that the jury applied the charge in a manner that foreclosed the consideration of appellant's addiction as mitigating.

Other Relevant Information. During the charge conference, the trial court gave a legally flawed justification for the erroneous instruction:

> I'm going to allow y'all to argue the mitigation aspect of this, but I'm going to leave this charge in there, because I don't want the jury, as the prosecutor just stated, to become confused to think that because he was on some drug, and it might have messed his mind up, that the punishment should be diminished to the point to where there could be no punishment. So I'm going to leave it in.

Contrary to the trial court's fears, the jury could not return a verdict of "no punishment" because that sentence would be outside the statutory range, rendering the judgment void. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) ("A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal."); *see also* Tex. Penal Code § 12.32(a) (the minimum sentence for a first-degree felony is five years' imprisonment).

The trial court's comment is also startling. The court essentially explained that it was giving the erroneous instruction because it was concerned that the jury might look at the evidence of addiction, regard that evidence as having reduced appellant's blameworthiness, and then assess a lenient sentence. Of course, the very purpose of mitigating evidence is to persuade the jury in that exact manner—to show that the defendant is deserving of leniency. It is hard to imagine an error more clearly "calculated to injure the rights of [the] defendant" than an instruction that was explicitly designed to diminish the mitigating potential of the defendant's own properly admitted evidence. *See* Tex. Code Crim. Proc. art. 36.19.

Considering that appellant was sentenced to life imprisonment, the maximum sentence permitted by law, I cannot say that the trial court's error was harmless.[2] *Cf. Erazo v. State*, 167 S.W.3d 889, 891 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that the erroneous admission of evidence during the

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[2] For his proposition that charge error may be harmless even if the defendant receives the maximum sentence permitted by law, Justice Jewell relies on *White v. State*, 779 S.W.2d 809 (Tex. Crim. App. 1989) and *Castaneda v. State*, 852 S.W.2d 291 (Tex. App.—San Antonio 1993, no pet.). Both of those cases involved the same type of charge error: the omission of a "no-adverse-inference" instruction. That charge error simply does not compare to the facts of this case. The omission of an instruction cannot amount to a comment on the weight of the evidence, which was the effect of the challenged instruction that was affirmatively submitted here. Also, the "no-adverse-inference" rule is routinely discussed during voir dire, which means that the juries in those cases were likely familiar with it already and that the omission of the instruction did not influence those sentencing decisions. The same cannot be said of the challenged instruction in this case, which was not discussed during voir dire and which undermined the only evidence that appellant offered in mitigation.

punishment phase of trial was not harmless where the defendant was assessed the maximum punishment); *see also Kresse v. State*, No. 2-09-21-CR, 2010 WL 1633383, at *2 (Tex. App.—Fort Worth Apr. 22, 2010, no pet.) (mem. op., not designated for publication) (holding that the trial court had reversibly erred by giving a voluntary-intoxication instruction during the punishment phase of trial). I would reverse the trial court's judgment and remand for a new hearing on punishment only.[3]

I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Jewell.
Publish — Tex. R. App. P. 47.2(b).

[3] If I were writing for the court, I would not reach appellant's third issue because, under my analysis, appellant's second issue would be dispositive. But if I did have occasion to address appellant's third issue, my approach would differ slightly from this court's main opinion. In his third issue, appellant complains about the trial court's ruling on his objection to an improper closing argument. Appellant contends that the argument was improper because the prosecutor commented directly on appellant's in-court remorselessness. Because appellant did not actually testify in court, the prosecutor's comment infringed on appellant's right not to testify. Nevertheless, the trial court overruled appellant's objection, and this court's main opinion treats that ruling as "presumed error." That characterization does not go far enough. The prosecutor's closing argument was categorically improper and the trial court's ruling was actual error. *See Snowden v. State*, 353 S.W.3d 815, 823 n.34 (Tex. Crim. App. 2011). In this court, not even the State pretends otherwise. I would characterize the trial court's ruling as "error," not "presumed error." We cannot expect the administration of our criminal justice system to improve if we are unwilling to acknowledge true errors for what they are.