Affirmed and Memorandum Opinion filed April 20, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00301-CR

ROBERT WALTER THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 15CR0745

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

Appellant Robert Thomas appeals from his conviction for possession with the intent to deliver a controlled substance. Appellant does not contest his conviction, but does challenge the sentence assessed as punishment. In a single issue, appellant argues that there was reversible error in the jury charge on punishment. We overrule his issue and affirm the trial court's judgment.

Background

Appellant was charged with possession with the intent to deliver methamphetamine, a controlled substance, in an amount greater than four grams but less than two hundred grams—a first-degree felony. Appellant pled not guilty, and the case went to trial. A jury found appellant guilty.

The same jury then heard evidence and argument on punishment. The jury charge on punishment omitted part of a statutorily mandated instruction pertaining to appellant's eligibility for parole. Appellant did not object to the omission. After deliberation, the jury assessed seventy years' confinement as punishment.

Analysis

In a single issue, appellant argues reversible error in the jury charge on punishment. The State responds that the error is not reversible because it is not harmful.

When reviewing alleged jury charge errors, we first determine whether there was error in the charge. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). If there was error and the defendant objected to the error at trial, reversal is required if the error was "calculated to injure the rights of the defendant," which the Court of Criminal Appeals has defined to mean "some" actual harm. *Id.* (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)). If the defendant did not object to the error at trial, we will reverse only if the error was so egregious and created such harm that the defendant was deprived of "a fair and impartial trial." *Id.*

Appellant complains of an omission in one of the instructions on parole law. In cases like appellant's, the Legislature mandates specific parole instructions at the punishment phase. The Texas Code of Criminal Procedure provides:

> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served *plus any good conduct time earned* equals one-fourth of the sentence imposed or 15 years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

Tex. Code Crim. Proc. art. 37.07, § 4(b) (emphasis added).

In this case, the jury charge omitted the italicized portion above, "plus any good conduct time earned." Generally, omitting mandatory language from the jury charge is error. *See, e.g.*, *Luquis v. State*, 72 S.W.3d 355, 363 (Tex. Crim. App. 2002). We hold that the trial court erred in giving the instant instruction because it did not include the full text of the mandatory instruction.

We next proceed to a harm analysis. Appellant concedes that he failed to object to the omitted language. Accordingly, we may reverse only if that omission caused egregious harm. *See Ferguson v. State*, 335 S.W.3d 676, 684 (Tex. App.—Houston [14th Dist.] 2011, no pet.). We assess harm 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 as a whole. *See Lyle v. State*, 418 S.W.3d 901, 905 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Elsewhere in the punishment-phase charge, the trial court informed the jury that it "may consider the existence of the parole law and good conduct time" and further clarified that "[u]nder the law applicable in this case, the Defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time." The charge also instructed the jury not "to consider the extent to which good conduct time may be awarded to or forfeited by this particular Defendant" or "to consider the manner in which the parole law may be applied to this particular defendant." In other words, the jury

could consider the possibility of parole as a general concept, but was not to specifically take parole or good-conduct time into consideration when assessing an appropriate punishment. *See Luquis*, 72 S.W.3d at 360.

The Court of Criminal Appeals has characterized the instruction not to consider the extent to which parole law may be applied as "curative." *Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006). Thus, the presence of this instruction is one factor that "mitigate[s] against a finding of egregious harm." *Id.*

Turning to the state of the evidence, the evidence supporting the punishment verdict is strong. The State reoffered and the trial court admitted all of the evidence from the guilt/innocence phase of the trial. The State's case in chief, essentially, was that law enforcement officers seized roughly five grams of methamphetamine ("meth") from inside a house where appellant was alleged to have been living. Appellant's defense was that he did not live at the house and that he was unaware of any drug operation running out of the house. We briefly summarize the evidence and testimony presented by each side.

The Galveston County Sheriff's Office conducted surveillance of appellant and his girlfriend, Ashlie Hocutt, for three to four months, at different residences. The Sheriff's Office eventually executed search and arrest warrants for appellant and Hocutt at Hocutt's house in Bacliff, which was where appellant had told his parole officer he lived.[1] Appellant was outside with a man and a woman. The woman was detained, searched, and found to be in possession of roughly thirteen grams of meth.

When law enforcement officers entered the house, they found Hocutt attempting to flush an unknown quantity of meth down the toilet. Officers

[1] Appellant was on parole from a 2014 conviction for failure to register as a sex offender.

recovered a little over four grams of meth in the bathroom and another gram in the bedroom. Officers also found a digital scale, two meth pipes, and plastic baggies with the corners torn off.[2] There were several cameras around the exterior of the house, and a television monitor showing multiple camera feeds; an officer testified that such surveillance or security equipment was common among drug dealers "to let them know who is around, number one, to possibly prevent any rip-offs by other drug dealers . . . [a]nd, two, to alarm them if they ever see the police coming." The officers found men's and women's clothing in the bedroom closet, as well as an ankle monitor in its docking station plugged in near the closet. Appellant was on parole at the time and was required to wear an ankle monitor. Officers found a ledger or notebook with several pages of names and various numbers next to each name, as well as the notations "w/out bag ball – 3.4" and "w/bag – 4.2 110."[3] Forensic testing later confirmed appellant's thumbprint on the ledger. That thumbprint was the only fingerprint found on the ledger.

Three officers testified that, after executing the warrants and seizing the evidence, they believed that appellant and Hocutt were selling narcotics out of the residence. One of the officers testified that meth "is pretty much the No. 1 illegal drug that's being distributed" in Galveston County.

After appellant was arrested, he was recorded in jail telling a visitor that "[s]he flushed a brick."[4] One of the investigating officers testified that he believed

[2] Officers testified that drug dealers often package drugs into plastic sandwich bags, rip the bag at the corner (with the drugs in the torn corner), and then tie the corner off or burn the plastic edges to seal it.

[3] According to a testifying officer, a "ball" is shorthand for an "eight-ball," which is a slang term for an eighth of an ounce of narcotics.

[4] According to one of the law enforcement officers who testified, a "brick" is a slang term for a kilogram or "kilo" of a particular narcotic, weighing roughly 2.2 pounds. While the terms are more commonly associated with cocaine, they also are used to refer to meth being packaged and sold by the kilo, according to the testifying officer.

appellant was referring to Hocutt. The officer also testified that "[i]t means that [appellant] knew how much narcotics were in the house."

Appellant did not testify in his defense, but his attorney, when questioning other witnesses, argued that appellant did not live in Hocutt's house, that appellant instead lived in the garage.[5] In closing argument, appellant's attorney argued that appellant had no knowledge of a meth operation running out of the main house.

The defense's only witness was Hocutt, who was arrested at the same time as appellant and pled guilty to a possession charge, for which she was sentenced to nine years' confinement. Hocutt testified that appellant moved into the garage a month before the pair was arrested; that everything in the house was hers, including the drugs, scale, plastic baggies, and ledger with names of "[p]eople that owed [her] money . . . [f]or drugs"; and that appellant did not know anything about her dealing drugs. Hocutt also testified that she loved appellant, that she was still dating appellant, and that she had told appellant that she was his guardian angel. When cross-examining Hocutt, the State introduced letters written by appellant while in jail that instructed the recipient "to write [Hocutt] and tell her I was living in the garage cause of the fight's [sic]." Several letters indicate that appellant was worried about Hocutt "flip-flopping."

The charge allowed the jury to find appellant guilty if the State proved, beyond a reasonable doubt, that appellant committed the charged crime, or if, under the law of parties, the State proved, beyond a reasonable doubt, that

[5] Appellant's parole officer testified that appellant had a curfew in the evenings, at which time appellant had to be inside his residence; that appellant would have had to notify the parole officer that appellant was living in the garage; and that the rules parolees sign when they are placed on parole specifically state, "Your residence does not include the garage." The parole officer conceded, however, that the garage was close enough to the house that, if appellant entered the garage, the ankle monitor would not register appellant as being outside the boundaries of the house.

appellant assisted Hocutt in the commission of the crime. The jury found appellant guilty of the charge of possession of more than four grams of a controlled substance with the intent to deliver.

The majority of the rest of the evidence presented at punishment pertained to appellant's prior convictions. Judicial records established that appellant:

> entered a plea of nolo contendere to a charge of sexual battery of a physically helpless victim, for which he received four years' confinement;
>
> pled guilty to a charge of possession of a controlled substance, for which he received twelve months' confinement;[6]
>
> was convicted by a jury on a charge of failure to register as a sex offender, for which he received three years' confinement;
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> pled guilty to a charge of felony possession of marijuana, for which he received six months' confinement;
>
> pled guilty to a charge of attempted failure to register as a sex offender, for which he received eight months' confinement;
>
> pled guilty to a charge of failure to comply with sex offender registration requirements, for which he received two years' confinement;
>
> pled guilty to a misdemeanor charge of driving with a suspended license, for which he received a fine only;
>
> entered a plea of nolo contendere to a misdemeanor charge of theft, for which he received fifteen days' confinement;
>
> entered a plea of nolo contendere to a misdemeanor charge of indecent exposure, for which he received twenty-eight days' confinement; and
>
> entered a plea of nolo contendere to a charge of evading arrest, for which he received twenty-eight days' confinement.

[6] In addition to the trial court's admission of the judgment in that prior conviction, a police officer testified that, while he was working undercover, appellant sold and delivered to the officer "about a gram of powder cocaine."

The State introduced evidence that appellant was in the Aryan Brotherhood of Texas, a "common criminal street gang[]," according to a detective with the Criminal Investigation Division of the Galveston County Sheriff's Office.[7] The detective testified that the Aryan Brotherhood's purposes were "violence, extortion, narcotics, [and] trafficking." The detective testified that, on four separate occasions, appellant admitted to law enforcement personnel that he was a member of the Aryan Brotherhood of Texas. Three law enforcement agencies also "had [appellant] on file" as a member of the Aryan Brotherhood.

Appellant testified in the punishment phase. He claimed that while he "got involved" with the Aryan Brotherhood when he was in jail "basically to survive," he was never a member of the gang. Appellant's attorney asked him about several of his prior convictions. Appellant was convicted of sexual battery of a physically helpless victim for having sexual intercourse with an intoxicated woman; he was convicted of indecent exposure after running down the street naked. When asked if any of his prior offenses had to do with children, appellant responded "no." Appellant's attorney argued to the jury that none of appellant's prior crimes were "violent . . . or racist in nature."

After the close of evidence, the State urged the jury to consider the impact of the punishment assessed on the community—that "this is not a victimless crime. . . . It affects all of us in our community because meth is an epidemic." The prosecutor referred to evidence admitted in the guilt and innocence phase—specifically the "ledger" containing forty names of people who owed money to appellant and Hocutt. The prosecutor asked the jury to start at the minimum (25 years) and then

[7] A criminal street gang is defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code § 71.01(d).

"give him a year for each life in this book. That's going to get you to 65 years. And that's fair."[8]

Appellant's attorney responded: "The minimum is a lifetime. He's 40 years old. And the Judge instructed you that when you're determining the number that you're going to sentence him to, you have to consider the full number." The defense asked the jury to assess the minimum, considering it was a non-violent crime.

Neither side expressly referred to the applicable parole law in closing arguments. The issue of the parole law was "not central to the case regarding punishment," which mitigates against a finding of egregious harm. *Stewart v. State*, 293 S.W.3d 853, 859 (Tex. App.—Texarkana 2009, pet. ref'd); *see also Igo*, 210 S.W.3d at 647 (noting that "parole was not mentioned by either counsel during argument on punishment" and concluding there was no egregious harm).

We also note that nothing in the record suggests that the jury had any question concerning either the application or meaning of the parole law or that the parole law affected its assessment of punishment. *See Stewart*, 293 S.W.3d at 859-60 (court may, as part of its harm analysis based on "any other relevant information revealed by the record," consider whether record suggested jury was confused regarding the parole law). The jury sent one note to the judge, asking to see the search warrant, but sent no note or question pertaining to parole law or good-conduct time. There is no "active showing of any effect" of the parole law on the jury's deliberation or its assessment of punishment. *Id.*; *see also Hugill v. State*,

[8] Before the punishment phase of trial commenced, appellant pled "true" to two enhancements, both pertaining to appellant's convictions for the felony offense of failure to comply with sexual offender registration requirements. These enhancements increased the minimum punishment, from five years to twenty-five years of confinement. The maximum punishment the jury could assess was ninety-nine years' confinement or life in prison. *See* Tex. Penal Code §§ 12.32(a), 12.42(d).

787 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) ("While not a foolproof indicator that the jury did not consider the effect of the parole law on the sentence appellant would serve, the jury notes [on other subjects] at least leave the impression that the jury's attention was elsewhere.").

Finally, we consider the severity of the sentence assessed by the jury. *See Roberts v. State*, 321 S.W.3d 545, 557 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Seventy years is a long time, but it is not the maximum sentence possible. It is only five more years than the amount of time sought by the State, and eight more years than the median of the permissible range (twenty-five to ninety-nine years). Given the other mitigating factors—the curative instruction, the strength of the evidence, and the absence of argument about parole by either side—we cannot say that the length of the sentence indicates that the charge omission created such harm that appellant was deprived of "a fair and impartial trial." *Barrios*, 283 S.W.3d at 350; *see also Roberts*, 321 S.W.3d at 557 ("Appellant's punishment—fifty years' confinement—falls within the appropriate range of punishment, and thus does not weigh in favor of finding that appellant suffered egregious harm.").

Appellant asserts that most jury charge errors are harmless. The sole authority he cites in support of his egregious harm argument is *Hill v. State*, in which the court found egregious harm and reversed the sentence based upon a faulty parole instruction. *See Hill v. State*, 30 S.W.3d 505 (Tex. App.—Texarkana 2000, no pet.). *Hill* is distinguishable and is, in fact, the inverse of the error charged here. In *Hill*, the mandatory instruction on parole should have instructed the jury that the defendant would be eligible for parole when the actual time served equaled one-half of the sentence or thirty years, whichever is less, without consideration of any good conduct time possibly earned; the charge, as submitted, instructed the jury that the defendant would be eligible for parole when the actual

time served, *plus good conduct time*, equaled one-half of the sentence or thirty years. *Id.* at 507. This misstatement, according to the court of appeals, misled the jury as to when the defendant would be eligible for parole. *Id.* at 509.

Though the *Hill* court does not expressly say so, the erroneous instruction implies that the defendant's eligibility for parole would be accelerated by the inclusion of good-conduct time; this error—again, not expressly stated by the *Hill* court—may have led the jury to assess a longer sentence. *Accord id.* (Cornelius, C.J., dissenting) (arguing no harm from erroneous jury instruction when prosecutor "did not urge the jury to assess the thirty-year sentence to compensate for a possible early parole"). Here, in contrast, the jury had no expectation that appellant's eligibility for parole would be accelerated by good-conduct time and thus no temptation to assess a longer sentence. Accordingly, we cannot say that appellant suffered egregious harm by the omission of the clause referring to good-conduct time.

Under the stringent standards necessary to show "egregious harm," we conclude that the erroneous parole-eligibility instruction did not deprive appellant of a fair and impartial trial or affect the very basis of the case, deprive appellant of a valuable right, or vitally affect a defensive theory. *See Roberts*, 321 at 553.

We overrule appellant's sole issue.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell.
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