Affirmed and Memorandum Opinion filed June 22, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00337-CR

RAYMOND MARK GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 15-DCR-068702A

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

Appellant Raymond Mark Gonzales was found guilty by a jury of human trafficking and was sentenced to forty years in prison. On appeal, appellant contends that the trial court erred by submitting a jury charge that allowed for a non-unanimous verdict and that the error was egregiously harmful. We affirm.

FACTUAL BACKGROUND

The complainant, a woman in her early forties, suffered from a generalized seizure disorder and was reportedly intellectually disabled. She was living in an apartment complex in Rosenberg when she met appellant. After the two began having a relationship, appellant began beating her and forcing her to have sex with other men for money. Appellant, who was unemployed, used the money to pay for drugs and a place to live. The complainant was afraid to tell her family what was going on because appellant threatened to kill them and burn down their house if she did.

The complainant was eventually able to return to her family, who contacted police. After an investigation, appellant was charged by indictment with the offense of trafficking of persons by prostitution in Fort Bend County. A jury found appellant guilty and assessed his punishment at forty years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant timely appealed.

ISSUES AND ANALYSIS

In two issues, appellant contends that the trial court's jury charge allowed for a non-unanimous verdict and that the error was egregiously harmful.

Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). This means that the jury must agree upon a single and discrete incident that would constitute the commission of the offense alleged. *Id.*

When analyzing potential jury-charge error, our first duty is to decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we determine that error exists, we analyze that error for harm. *Id.* When a

defendant fails to object to the charge, we will not reverse for jury-charge error unless the record shows "egregious harm" to the defendant. *Id.* at 743–44. We review alleged charge error by considering two questions: (1) whether error existed in the charge; and (2) whether sufficient harm resulted from the error to compel reversal. *Id.* at 744.

Relevant here, the Texas Penal Code provides that a person commits an offense if the person knowingly:

> (3) traffics another person and, through force, fraud, or coercion, causes the trafficked person to engage in conduct prohibited by:
>
> (A) Section 43.02 (Prostitution);
>
> (B) Section 43.03 (Promotion of Prostitution);
>
> (C) Section 43.04 (Aggravated Promotion of Prostitution); or
>
> (D) Section 43.05 (Compelling Prostitution);
>
> (4) receives a benefit from participating in a venture that involves an activity described by Subdivision (3) or engages in sexual conduct with a person trafficked in the manner described in Subdivision (3)[.]

Tex. Penal Code § 20A.02(a)(3)–(4). To "traffic" means "to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." *Id.* § 20A.01(4).

Appellant was charged in a two-count indictment alleging that he did:

> Count I
>
> Then and there, receive a benefit from participating in a venture the trafficking of [the complainant].
>
> COUNT II
>
> Then and there intentionally or knowingly traffic [the complainant] and through force, fraud, or coercion, caused the person to engage in prostitution.

Before jury selection, appellant's counsel objected that Count I did not allege a

culpable mental state. Appellant's counsel argued that "Count I should be struck in that it's mentioned again in Count II except that it has a mental state."

The trial court replied: "All right. Your objection as I'm perceiving it is that Count I does not set out the part of Section 4 that refers back to Section 3 to inform you of exactly what they're referring to; is that correct? In other words, Section 4 does not — it sets out that — it refers back to Section 3, but Count 1 doesn't set out in section — what Section 3 — the State's referring to; is that correct?" Appellant's counsel agreed.

The trial court decided to "strike the reference to Count I and merge Count I with Count II because that then creates the offense that you have alleged this gentleman committed. It just — it's a misnomering [sic] of counts." The court explained that the language of Count I would be subsumed into Count II, the two would be combined, and there would be no reference to two separate counts. Appellant's counsel agreed with the trial court's ruling "as long as intentionally and knowingly comes before all that."

The trial court went on to state that "[t]he words Count I and Count II will be removed from the indictment and the charge will be then and there received the benefit from participating in the venture of the trafficking of [the complainant], intentionally knowingly, traffic [the complainant] through force, fraud, or coercion and then caused a person to engage in prostitution, which is — which is what the statute says." Appellant's counsel made no objection to the court's charge.

At the conclusion of the trial, in the application paragraph of the court's charge, the trial court instructed the jury in relevant part:

> Now if you find from the evidence beyond a reasonable doubt that on or about January 1, 2014, in Fort Bend County, Texas, the defendant, Raymond Mark Gonzales, did then and there intentionally or

> knowingly receive a benefit from participating in a venture, the trafficking of [the complainant], through force, fraud, or coercion, caused the person to engage in prostitution then you will find Raymond Mark Gonzales guilty as charged.

Appellant contends that the application paragraph combines two different offenses that would allow the jury to convict without being unanimous. Specifically, appellant complains that the charge imports the language from subsection (3) into the instructions for subsection (4), but does so in an incomplete way that is confusing and authorizes conviction using a "mishmash" of elements between subsections (3) and (4).

Appellant relies on two cases holding that a trial court errs in giving a jury charge that allows for a non-unanimous verdict concerning what specific criminal act the defendant committed. *See Ngo*, 175 S.W.3d at 744 ("When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts."); *Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (holding that jury charge created possibility of non-unanimous verdict when State alleged one count of indecency with a child by breast-touching or genital-touching and presented evidence that each type of conduct occurred in separate instances). According to appellant, the charge in this case is worse than those in *Ngo* or *Francis* because "two separate crimes are combined in a manner that is confusing and could have operated to limit the State's proof."

The Court of Criminal Appeals has recognized three situations in which the jury charge fails to properly instruct the jury, based on the charged offense and the evidence in the case, that its verdict must be unanimous: (1) when the State

presents evidence demonstrating the repetition of the same criminal conduct, but the actual results of the conduct differed; (2) when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions; and (3) when the State charges one offense and presents evidence of an offense, committed at a different time, that violated a different provision of the same criminal statute. *Cosio*. 353 S.W.3d at 772. This case presents none of those scenarios.

Subsection (3) provides that a person commits an offense if the person knowingly "traffics another person and, through force, fraud, or coercion, cause the trafficked person to engage in" prostitution. *See* Tex. Penal Code § 20A.02(3)(A). Subsection (4) refers to subsection (3) by providing that a person commits an offense if the person "receives a benefit from participating in a venture that involves an activity described by" subsection (3). Based on the facts of this case, appellant commits an offense if he "receives a benefit from participating in the trafficking of another person and, through force, fraud, or coercion, causes the trafficked person to engage in prostitution." *See id.* § 20A.02(3)(A)–(4).

The jury charge in this case merely incorporated the applicable language from subsection (3) into the elements of subsection (4)—the offense of trafficking by receiving a benefit—to provide the jury with a complete statement of all of the elements of the indicted offense. The charge, though perhaps inelegantly phrased, correctly tracked the statutory language of the offense of trafficking of persons under subsection (4). Consequently, this case is not analogous to *Ngo* and *Francis*.

Contrary to appellant's assertion, the charge is not a "mishmash" of two offenses that would allow a non-unanimous verdict. Because we conclude that no error in the charge exists, we need not analyze the record for egregious harm. *See Ngo*, 175 S.W.3d 743.

CONCLUSION

We overrule appellant's first issue and do not reach his second. We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise.
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