Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00024-CR

Hector **RODRIGUEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 290th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR8869
Honorable Melisa Skinner, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 9, 2017

AFFIRMED

A jury convicted Hector Rodriguez of two counts of indecency with a child. On appeal, Rodriguez argues (1) the evidence was insufficient to support his convictions; (2) the trial court erred by excluding certain evidence; and (3) the trial court erred by failing to include an incident-unanimity instruction in the jury charge. We affirm.

BACKGROUND

On November 3, 2013, J.D., who was eight years old at the time, told her mother, L.D., that Rodriguez had pulled down her pants and touched her "butt." L.D. confronted Rodriguez, who

was a neighbor. Rodriguez denied that anything had happened. L.D. then called the sheriff's department, who sent officers to L.D.'s house to investigate. The following day, a forensic nurse examiner spoke to J.D. about the incident and conducted a physical examination of her.

Rodriguez was indicted for one count of indecency with a child by contact and one count of indecency with a child by exposure. The first count of the indictment alleged that Rodriguez intentionally and knowingly engaged in sexual contact with J.D. by touching part of her genitals with the intent to arouse or gratify the sexual desire of any person. The second count of the indictment alleged that Rodriguez, with the intent to arouse or gratify the sexual desire of any person, caused J.D. to expose part of her genitals to Rodriguez. Rodriguez pled not guilty to both counts.

At trial, the State presented testimony from numerous witnesses, including L.D., J.D., and the forensic nurse examiner. L.D. testified about J.D.'s outcry statements. J.D. testified about the November 3, 2013 incident and about two earlier incidents in which Rodriguez put his hands in her pants and touched her genitals. The forensic nurse examiner testified about the information J.D. had relayed to her about the incidents at the time of the examination. The defense called two witnesses to testify, Rodriguez's nine-year-old son and his mother. Both defense witnesses testified that Rodriguez and J.D. were never alone together. The jury found Rodriguez guilty on both counts. Rodriguez appealed.

SUFFICIENCY OF THE EVIDENCE-COUNT ONE

In his first issue, Rodriguez argues the evidence is insufficient to support his conviction for indecency with a child by contact.

Applicable Law

A person commits the offense of indecency with a child by touching any part of the genitals of a child under the age of 17 with the intent to arouse or gratify the sexual desire of any person. TEX. PENAL CODE ANN. § 21.11(a)(1), (c)(1) (West 2011).

When reviewing the legal sufficiency of the evidence to support a conviction, we consider the evidence in the light most favorable to the verdict and determine whether, based on the evidence and reasonable inferences therefrom, any rational juror could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). The jury is the sole judge of the credibility and weight of the evidence. *Ramsey*, 473 S.W.3d at 809. The jury may draw any reasonable inference from the evidence so long as it is supported by the record. *Id.* Therefore, as the reviewing appellate court, our role is to determine whether the necessary inferences made by the jury are reasonable based on the cumulative force of all of the evidence. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). We may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the jury. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). It is the jury's responsibility to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id*.

The State's Evidence

Complaining Witness's Mother

At trial, the complaining witness's mother, L.D., testified that at the time of the incidents Rodriguez and his wife were her neighbors. The Rodriguezes had a son, who attended the same elementary school as L.D.'s two children. Because L.D. had to be at work very early in the morning, she had arranged for Rodriguez's wife to watch her children before school. On school days, L.D. would drop the children off at the Rodriguezes' house and they would stay there until

it was time to catch the bus. At the appropriate time, either Rodriguez's wife or his mother would walk the children to the bus stop so they could catch the school bus.

On Sunday, November 3, 2013, L.D. and her children went to the grocery store. Upon returning home, the children saw the Rodriguezes' son outside playing in front of his house and they asked L.D. if they could go play with him. L.D. allowed the children to go play while she unloaded the groceries from the car. L.D. was about to leave the house to go check on the children, when her oldest child, J.D., came home. J.D. was crying and she looked upset and distraught. L.D. asked J.D. what had happened. J.D. said that Rodriguez had done something bad to her. According to J.D., Rodriguez had asked her to push something into his garage, and once she did so, Rodriguez asked her to push the item farther into his garage. Rodriguez told J.D. to go into the garage. When J.D. was inside the Rodriguezes' garage, Rodriguez asked her if she had ever lifted weights before. J.D. told Rodriguez that she had not. Rodriguez then handed J.D. a stick or a broom to simulate weights and told her to lie on a weight bench and lift the broom up and down. J.D. complied. At that point, Rodriguez pulled down J.D.'s pants and touched her butt. As J.D. told L.D. what had happened "she was completely distraught, like nothing I had ever seen before."

Shortly thereafter, L.D. went to Rodriguez's house and confronted him about the allegations made by J.D. Rodriguez said that nothing had happened, that he did not know anything, and that no one had been in the garage. L.D. then called the sheriff's department, who sent officers to her house. The officers talked to L.D. and J.D.

Complaining Witness

J.D. testified that Rodriguez was her neighbor and the father of one of her friends. J.D. and her younger brother went to Rodriguez's house early in the morning because her mother had to work. When it was time to catch the school bus, her friend's grandmother would walk J.D. and the other children to the bus stop. One morning after being dropped off at the Rodriguezes' house,

J.D. was sitting on the couch watching television and Rodriguez came and sat next to her. Rodriguez put his hands inside of J.D.'s pants and inside of her underwear. Rodriguez first put his hands in the back of J.D.'s pants, and then he moved them to the front of her pants. When Rodriguez moved his hands to the front of her pants, he started to touch the part of J.D.'s body where she "go[es] pee." Rodriguez also started to "tap." Rodriguez's actions made J.D. feel scared, worried, and shocked. When Rodriguez stopped, he left the room and went upstairs. At the time, the only other person in the room was J.D.'s little brother, who did not see what happened to her because he was busy watching television. Initially, J.D. did not tell anyone about this incident.

On another morning, a similar incident happened. J.D. was in the living room at Rodriguez's house when her little brother and Rodriguez's son were playing cars on a small wooden table and she was kneeling and watching them. Rodriguez "put his hands in [J.D.'s] pants." Like the previous incident, Rodriguez first put his hands in the back of her pants and then moved his hands to the front of her pants. Rodriguez did the same type of movements with his hands as before, starting to "tap in front of me." Rodriguez did not say anything to J.D., and J.D. did not say anything to Rodriguez because she was "still shocked." The other children did not see what happened because they were busy playing cars. No one else was in the room. Rodriguez stopped by taking his hands out of J.D.'s pants and walking away.

The third incident occurred on a Sunday. J.D. and her brother saw Rodriguez and his son on the sidewalk in front of their house and walked over to see what they were doing. Rodriguez was putting air in a bike tire. When Rodriguez was done, his son got on the bike and went to play. Rodriguez then told J.D. to pick up the toys that were scattered on the ground and put them in the garage. The garage door was partially open. J.D. complied by putting the toys just inside the garage. Rodriguez then asked her to put the toys farther inside the garage so she crawled under the garage door and put the toys by the interior door, which goes to the living room of the house. When

J.D. turned around, Rodriguez was also inside of the garage. Rodriguez asked J.D. if she had ever lifted weights before and she told him she had not. Rodriguez gave her a broom and told her to lift the broom up and down with both hands to practice. Rodriguez showed her a weight bench and told her to lay down. J.D. lay on her back with her legs "halfway up" on the weight bench and "next to my butt." J.D. saw Rodriguez go to the edge of the weight bench where her feet were and when he got there, he took "my pants down halfway, took my underwear down halfway" and "started to tap my front part" with "his hands. Rodriguez also started to touch "the bottom of me," "my butt," with "his hands." Rodriguez told J.D. not to tell anybody and "said something about his grandma, that she would get mad." J.D. said she laid there in the garage with her pants down for about "four or five minutes." After that, J.D. asked Rodriguez if she could go play, and Rodriguez told her she could. Rodriguez told her to pull up her pants and panties, and J.D. did so.

J.D. then ran out of the garage and to her mother. J.D. saw her mother outside, walking the dog. J.D., who felt terrible, told her mother that she did not want to go to the Rodriguezes' house anymore. J.D. told her mother what Rodriguez had done to her in the garage on the weight bench, and about Rodriguez touching her butt and her front part. Later that day, J.D. told a police officer what had happened.

Sheriff's Deputy

Bexar County Sheriff's Deputy Alexander Uriegas testified that he was dispatched to L.D.'s house on November 3, 2013, for a sex offense. Uriegas spoke to L.D. and J.D. about the allegations J.D. had made against Rodriguez. After talking to L.D. and J.D., Uriegas walked over to Rodriguez's house and talked to him about J.D.'s allegations. Rodriguez denied that anything had happened and said J.D.'s story was fabricated. Rodriguez told Uriegas that he was having neighbor issues with J.D.'s family and that he had "gotten after" J.D. for something. Uriegas

noticed that the garage door of Rodriguez's house was only about one to three feet open. Uriegas also saw a bench press in the garage with nothing on it.

Forensic Nurse Examiner

Rebecca Doughty, a forensic nurse examiner, testified that she had examined J.D. on November 4, 2013, the day after J.D. made the allegations against Rodriguez. Prior to the physical examination, Doughty talked to J.D. about the incident so that she could determine the nature and extent of the examination. During this discussion, J.D. told Doughty that she was lying on her back when the touching occurred and that her legs were "lifted up in the air." J.D. also told Doughty that Rodriguez had pulled down her pants and panties and rubbed her butt. J.D. said that after Rodriguez rubbed her butt, Rodriguez put her legs down and "kind of sat on my legs." J.D said these events had happened the previous day. J.D. also said that she had been touched by Rodriguez in a similar manner in the past, prior to Halloween. According to J.D., Rodriguez had previously put his hands in her panties and touched her privates. As J.D. said this, she pointed to her genital area.

The Defense's Evidence

Rodriguez's son

Rodriguez's son testified that he and J.D. used to ride bikes together. Once, he and J.D. got into an argument and she hit him on the head with a broom. He told his mom and dad about it and J.D. got in trouble. About a week later, J.D. apologized to him and brought him a cupcake. It had been about a year since he and J.D. had talked; they were not really friends anymore because J.D. had lied.

Rodriguez's son remembered the day the police came to his house. The police came to his house because J.D. had told a lie—that his dad had touched her inappropriately. The garage door was open halfway. He did not see his dad touch J.D. inappropriately. He did not see his dad inside

the garage with J.D. However, he did see J.D. inside the garage and she was looking for the broom that she had used to hit him on the head. Additionally, in the past, he had seen his dad in the living room with J.D., but his dad was never by himself with J.D.

Rodriguez's Mother

Finally, Rodriguez's mother testified that she lived with her son and his family and helped out with the children. She would take her grandson and the other children to the bus stop in the morning. According to Rodriguez's mother, she never left J.D. alone with Rodriguez. She was home on November 3, 2013. She did not see J.D. go into the garage and she did not hear J.D. asking for help or making noise in the garage that day.

Discussion

In arguing that the evidence is insufficient to support his conviction for count one of the indictment, Rodriguez asserts that J.D. gave inconsistent accounts of the offense to her mother, the nurse, and at trial. According to Rodriguez, "J.D. never told a consistent story to any adult." Additionally, Rodriguez points to the evidence presented by the defense, specifically his son's testimony that he did not see Rodriguez go into the garage with J.D., that he did not see Rodriguez touch J.D. inappropriately, and that he did not see Rodriguez alone with J.D.

In conducting a legal sufficiency review, we are not permitted to re-evaluate the jury's credibility determinations. *Isassi*, 330 S.W.3d at 638. It is the jury's prerogative to weigh the evidence, to judge the credibility of the witnesses, and to choose between conflicting theories of the case. *Merritt v. State*, 368 S.W.3d 516, 527 (Tex. Crim. App. 2012). The jury resolves any inconsistencies in the evidence. *Isassi*, 330 S.W.3d at 638. We conclude that the evidence, viewed in the light most favorable to the jury's verdict, is sufficient to support the jury's finding of guilt as to the offense of indecency with a child by contact. We overrule Rodriguez's first issue.

SUFFICIENCY OF THE EVIDENCE—COUNT TWO

In his second issue, Rodriguez argues the evidence is insufficient to support his conviction for indecency with a child by exposure.

A person commits the offense of indecency with a child by exposure by causing the child to expose any part of the child's genitals with the intent to arouse or gratify the sexual desire of any person. TEX. PENAL CODE ANN. § 21.11(a)(2)(B).

In arguing that the evidence is insufficient to support his conviction for indecency with a child by exposure, Rodriguez claims that no evidence was presented showing that J.D.'s genitals were actually exposed. Rodriguez argues the evidence is insufficient to support his conviction because the State presented no evidence concerning J.D.'s clothing on the day of the offense. Rodriguez asserts that at the time of the offense J.D.'s genitals could have been covered by a long shirt or dress.

J.D. testified that she was lying on a weight bench with her feet on the bench "next to my butt" and a broom in her hands when Rodriguez went to the edge of the weight bench and pulled her pants and her underwear "down halfway." Rodriguez then started to "tap" on her "front part" with his hands and started to touch her "butt" with his hands. While Rodriguez was performing these actions, he told J.D. not to tell anyone. J.D. estimated that her pants were down for four or five minutes. Rodriguez then told J.D. to pull her panties and pants back up. Based on this evidence, the jury could have inferred that Rodriguez caused J.D. to expose part of her genitals. *See Ramsey*, 473 S.W.3d at 809 (providing that the jury may draw reasonable inferences from the evidence so long as they are supported by the record). We conclude that the evidence, viewed in the light most favorable to the jury's verdict, is sufficient to support the jury's finding of guilt as to the offense of indecency with a child by exposure. We overrule Rodriguez's second issue.

EVIDENTIARY RULING

In his third issue, Rodriguez argues the trial court erred by refusing to admit J.D.'s school records into evidence. Rodriguez argues that the excluded records were relevant to J.D. and L.D.'s credibility and, therefore, were admissible. Rodriguez's briefing on this issue provides no citations to cases analyzing the pertinent evidentiary rules. The only cases Rodriguez cites in this section of his brief concern preservation of error, the standard of review, harm analysis, and the importance of credibility determinations in cases involving sexual offenses.

An appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). Here, Rodriguez has failed to support the substance of his argument—that the excluded evidence was relevant to the credibility of certain witnesses—with appropriate citations to legal authorities. *See Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000) (concluding the appellant inadequately briefed points when none of the cases cited concerned the issue presented).

We conclude that Rodriguez has inadequately briefed this issue, and therefore, nothing is presented for our review. *See id*. We overrule Rodriguez's third issue.

UNANIMITY INSTRUCTION

In his fourth issue, Rodriguez argues the trial court erred in failing to include an incident-unanimity instruction in the jury charge.

Applicable Law

A jury must reach a unanimous verdict about the specific crime the defendant committed. *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). A jury must agree upon a single and discrete incident that would constitute the commission of the offense alleged. *Id*. In other words, a jury must agree on the factual elements underlying the charged offense, not just that a statute was violated. *Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000).

One situation in which jury non-unanimity may occur is when the State charges one offense and then presents evidence that the defendant committed the charged offense on multiple but separate occasions. *Cosio*, 353 S.W.3d at 772. In this situation, the jury charge must contain an instruction informing the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented. *Id*. at 774. The failure to include such an instruction in the jury charge is error. *See id*.

Not all jury-charge errors require reversal. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). To determine if jury-charge error requires a reversal, we first determine if the defendant objected to the erroneous charge. *Id*. If the defendant did not object, then he must show that the error was fundamental and that he suffered egregious harm, which is a high and difficult standard to prove. *Id*. 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). In determining whether an appellant was egregiously harmed by jury-charge error, we examine the following four factors (1) the entire jury charge; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) the parties' arguments; and (4) all other relevant information in the record. *Id*.

Discussion

Here, the State presented evidence that Rodriguez committed the offense of indecency with a child by contact on multiple but separate occasions. *See Cosio*, 353 S.W.3d at 772. Therefore, the trial court should have included an incident-unanimity instruction in the jury charge. *See id*. at 774. However, because Rodriguez did not complain about the absence of an incident-unanimity instruction in the trial court, he must show that the error was fundamental and that he suffered egregious harm to prevail on appeal. *See Reeves*, 420 S.W.3d at 816. To determine if Rodriguez was egregiously harmed, we examine the four applicable factors.

The Entire Jury Charge

The charge in this case stated that Rodriguez was charged with (1) the offense of indecency with a child by contact, alleged to have been committed on or about September 3, 2013; and (2) the offense of indecency with a child by exposure, alleged to have been committed on or about November 3, 2013. The jury charge also stated that the phrase "on or about" meant that the law did not require the State to prove the exact date the alleged offense was committed. The only mention of the word "unanimous" in the charge was boilerplate language stating that the foreperson's duties included signing the verdict as "foreperson" when the jury had "unanimously agreed upon a verdict." The jury charge did not include an instruction informing the jury of an incident-unanimity requirement. Because the charge should have contained an incident-unanimity instruction, we conclude this factor weighs in favor of a finding of egregious harm. *See Arrington*, 451 S.W.3d at 841 (concluding jury charge factor weighed in favor of an egregious harm finding when the charge failed to apprise the jurors that they had to be unanimous on which incident of criminal conduct they believed constituted each count).

The State of the Evidence

J.D. testified about three incidents that involved the touching of her genitals. According to J.D.'s testimony, the first two incidents occurred on two separate weekdays, early in the morning, after she was dropped off at the Rodriguezes' house. J.D. testified that these incidents occurred before October 31, 2013. J.D. also testified about another incident that involved both the exposing of and the touching of part of her genitals. This incident occurred on a Sunday, November 3, 2013.

According to Rodriguez, none of these incidents occurred. During cross-examination of the State's witnesses, Rodriguez challenged J.D.'s credibility. Rodriguez emphasized L.D.'s testimony that J.D. was a "jokester" and suggested that J.D. had made the allegations because he had admonished her for hitting his son in the head with a broomstick. Rodriguez also called

attention to the fact that J.D. did not immediately report the two incidents that occurred in the living room before Halloween. In addition, Rodriguez presented testimony from family members that Rodriguez and J.D. were never alone together.

Because the jury found Rodriguez guilty on both counts of the indictment, the record indicates that the jury completely rejected Rodriguez's defensive theories. In all likelihood, the jurors believed J.D.'s testimony in its entirety. *See id*. at 844 (noting that the jury clearly credited the complaining witness's story and did not believe the defendant's categorical denial of the accusations when it found him guilty on six of the seven counts on which he was indicted); *Cosio*, 353 S.W.3d at 777-78 (stating it was logical to suppose that the jury unanimously agreed that the defendant committed all of the separate instances of criminal conduct when the victim detailed each of the incidents, her testimony was not impeached, and the defense presented was "essentially of the same character and strength across the board."). Given the state of the evidence, it is unlikely that some of the jurors relied on one incident to support their finding of guilt, while other jurors relied on a different incident to support a finding of guilt. We conclude that the state of the evidence weighs against a finding of egregious harm.

Statements of the Parties and the Trial Court

Under this factor, we consider whether any statements made during the trial by the prosecutor, the defense counsel, or the trial court may have exacerbated or ameliorated error in the charge. *Arrington*, 451 S.W.3d at 844. Neither the prosecutor nor defense counsel directly addressed the incident-unanimity issue during the trial. However, during her closing argument, the prosecutor distinguished between count one and count two, stating that count one involved the touching incidents that occurred in the house before Halloween, and count two involved the exposure incident that occurred in the garage. Thus, the prosecutor focused the jurors' attention on two of the three touching incidents and urged them to rely on these incidents to find Rodriguez

guilty on count one. The prosecutor also asked the jurors "to return a verdict on both counts. We ask that you be unanimous about those."

Additionally, immediately after the prosecutor's closing argument and before the jurors began their deliberations, the trial court instructed them: "Ladies and gentlemen, I instructed you on what 'on or about' means. Let me just also say that when you return your verdict, whatever it is, you must all 12 of you *unanimously agree upon which incident* you're returning each verdict." (emphasis added). The trial court's ad hoc instruction, delivered immediately after the prosecutor's closing argument and before the jury began its deliberations, ameliorated the absence of an incident-unanimity instruction in the jury charge. We conclude that the statements made by the prosecutor and the trial court weigh against a finding of egregious harm.

Other Relevant Information in the Record

Nothing in the record shows that the jurors failed to agree about the specific crime committed. Nor does the record show that the jurors were confused or misled about the incident-unanimity requirement. We conclude this factor weighs neither in favor nor against a finding of egregious harm.

Rodriguez relies on *Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005), to support his argument that he was egregiously harmed by the absence of an incident-unanimity instruction. However, *Ngo* presented a very different scenario. In *Ngo*, the error in omitting a unanimity instruction from the jury charge was compounded by the fact that the jurors were affirmatively told on three occasions (twice by the prosecutor and once by the trial judge) that they could "mix and match" and that they did not need to agree on a particular criminal act to return a guilty verdict. *Id.* at 751. Again, in the present case, the jurors were never affirmatively told that they did not need to agree about the specific crime committed. To the contrary, immediately before the jurors

began deliberating the trial court told them that they must "unanimously agree upon which incident you're returning each verdict."

In sum, the only factor that weighs in favor of a finding of egregious harm in this case is the charge itself. Two of the three remaining factors, the state of the evidence and the statements made by the parties and the trial court, weigh against a finding of egregious harm. We, therefore, conclude that Rodriguez was not egregiously harmed by the trial court's failure to include an incident-unanimity instruction in the jury charge. We overrule Rodriguez's fourth issue.

CONCLUSION

The judgment of the trial court is affirmed.

Karen Angelini, Justice

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