COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00136-CR

JESUS REYNALDO GONZALES — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 90TH DISTRICT COURT OF YOUNG COUNTY
TRIAL COURT NO. 10617

MEMORANDUM OPINION[1]

A jury convicted Appellant Jesus Reynaldo Gonzales of the offense of assault on a family or house member by impeding the normal breathing or the circulation of blood while having a prior conviction for an offense of an assault on a member of his family. Tex. Penal Code Ann. § 22.01(b-1) (West Supp. 2016). After Appellant pled true to the two habitual offender paragraphs, the jury assessed his punishment at confinement in the penitentiary for sixty years. The

[1]*See* Tex. R. App. P. 47.4.

trial court sentenced him accordingly. In three issues, Appellant contends the evidence is insufficient, the trial court erred in giving an *Allen* charge, and the trial court violated article 36.16 of the code of criminal procedure, which governs supplemental jury charges, by giving the *Allen* charge.[2] Tex. Code Crim. Proc. Ann. art. 36.16 (West 2006). We will affirm.

Sufficiency of the Evidence

In Appellant's first issue, he contends that the evidence is insufficient because there is no evidence that he impeded the complainant's normal breathing or blood circulation. Appellant notes that the complainant, in an unrelated accident, died the day after the assault alleged in the indictment. Consequently, he was not able to confront her directly at trial. Appellant acknowledges that the State introduced a video in which the complainant tells paramedics that he choked her, but he contends that evidence of choking is insufficient to show impairment of breathing or blood circulation.

Standard of Review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to

[2]A supplemental charge to a jury that has declared itself deadlocked is widely known as an *Allen* charge. *Mixon v. State*, 481 S.W.3d 318, 325 (Tex. App.—Amarillo 2015, pet. ref'd). One alternative name for an *Allen* charge is a "dynamite" charge. *Id.* An *Allen* charge takes its name from *Allen v. United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 157 (1896). Generally speaking, an *Allen* charge is designed to remind the jury that if it is not able to reach a verdict, a mistrial will result, the case will remain pending, and there is no guarantee that a second jury will find the issue any easier to resolve. *Mixon*, 481 S.W.3d at 325; *see also Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006).

determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49.

Discussion

The evidence was more extensive than the complainant's videotaped statement that Appellant had choked her. Lieutenant Miranda Wright of the Olney Police Department testified that some of the photographs of the

complainant in State's Exhibit 7 depicted fingerprint marks on both sides of the complainant's neck and that the photographs were consistent with the complainant's statement on the video that Appellant had choked her. Lieutenant Wright testified that choking the complainant on the neck in these areas would have blocked the airway and the blood from circulating. Lieutenant Wright also said that she took a statement from the complainant in which the complainant described being choked and not being able to breathe.

Additionally, Michelle Ayers, the EMT who treated the complainant, testified that the complainant had swelling and visible injuries on the sides of her neck that were consistent with being choked and with the complainant's statement that she had been choked. Ayers testified that choking can cause oxygen to be cut off from the brain, can prevent breathing, and can cause death if done long enough.

Accordingly, there was evidence that Appellant choked the complainant (which Appellant concedes); there was evidence that the complainant asserted the choking in this case impeded her ability to breathe; there was evidence that, as a general proposition, choking can impede a person's ability to breathe; and there were photographs showing Appellant left marks on the complainant's throat. Viewing the evidence in the light most favorable to the verdict, we hold that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and, more specifically, could have found that

Appellant impeded the complainant's ability to breathe. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

We overrule Appellant's first issue.

The *Allen* Charge

In Appellant's second issue, he argues that the trial court erred by giving an unrequested *Allen* charge to the jury during the guilt-innocence phase of the trial when the jury had not indicated that it was deadlocked and thereby coerced the jury into a verdict of guilty and a deadly weapon finding. In his third issue, a related issue, Appellant contends that the unrequested *Allen* charge also violated article 36.16 of the code of criminal procedure.

The jury began deliberations at 11:11 a.m. At 1:43 p.m., the jury sent out a question that asked, "What happens if we are not unanimous about hands not being a deadly weapon?" The trial court proposed reading an *Allen* charge to the jury, and neither side objected. After breaking until 4:00 p.m., the jury returned to the courtroom, and the court read the following to the jury:

THE COURT: You may be seated.

> Ladies and gentlemen, I'm going back to Question No. 2 that says: What happens if we're not unanimous about hands not being a deadly weapon? Signed the foreperson of the jury.
>
> I'm going to read the following statement to you:
>
> Members of the jury, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of other jurors, each juror should show a proper regard to the opinions of other jurors.

> If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the Court to declare a mistrial and discharge the duty of the jury. The punishment phase will still be pending and it's reasonable to assume--well, actually the guilt/innocence and punishment phase will still be pending and it's reasonable to assume that the case will be tried again before another jury at some future time. Any such future jury will be [impaneled] in the same way this jury has been [impaneled] and will likely hear the same evidence which has been presented to this jury.
>
> The questions to be determined by that jury will be the same questions confronting you and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.
>
> With this additional information you are instructed to continue deliberations in an effort to arrive at a verdict that is acceptable to all member[s] of the jury if you can do so without violating your conscience. Signed by me.

The jury retired to deliberate again at 4:07 p.m. and returned its verdict at 4:48 p.m.

Standard of Review

"[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Id.* If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id.* Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see* Tex. Code Crim. Proc. Ann. art. 36.19 (West 2006). The

appropriate inquiry for egregious harm is fact specific and must be performed on a case-by-case basis. *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

Whether the Jury was Deadlocked
and
Whether the Charge was Coercive

In his second issue, Appellant contends that the jury never declared that it was deadlocked; therefore, the trial court erred by giving the *Allen* charge. *See Barnett*, 189 S.W.3d at 277 n.13 (stating that an *Allen* charge is "a supplemental charge sometimes given to a jury that declares itself deadlocked.") Appellant also contends that the *Allen* charge was coercive.

The jury did not expressly state in its note that it was deadlocked; however, the central concern of the jury note was a deadlocked vote and its consequences. One construction of the jury note is that the jury was asking a hypothetical question out of mere curiosity. Another construction of the jury note was that the jury was actually deadlocked and wanted to know the consequences. The trial court, the prosecutor, and the defense attorney all treated the jury note as the latter. On this record, we hold it was not error for the trial court to treat the jury as having declared itself deadlocked and to have submitted the *Allen* charge when it did. *See generally Warren v. State*, No. 02-12-00164-CR, 2012 WL 5447957, at *2 (Tex. App.—Fort Worth Nov. 8, 2012, pet. ref'd) (mem. op., not designated for publication) (stating that where parties and trial court treat evidence as admitted, appellate court may treat it as

admitted); *Voelkel v. State*, 629 S.W.2d 243, 246–47 (Tex. App.—Fort Worth 1982) (stating that when amphetamine was treated as admitted into evidence, although it was never offered or admitted into evidence, amphetamine could be considered by trial court), *aff'd*, 717 S.W.2d 314 (Tex. Crim. App. 1986).

Turning to whether the *Allen* charge was coercive, to prevail on a complaint that an *Allen* charge is coercive, an appellant must show that jury coercion or misconduct likely occurred or occurred in fact. *West v. State*, 121 S.W.3d 95, 107 (Tex. App.—Fort Worth 2003, pet. ref'd). An *Allen* charge is unduly coercive and, therefore, improper only if it pressures jurors into reaching a particular verdict or if it improperly conveys the court's opinion of the case. *Id.* at 107–08.

The *Allen* charge utilized in this case is consistent with similar instructions used in other cases and held to be non-coercive. *See Mixon*, 481 S.W.3d at 326; *West*, 121 S.W.3d at 108–09. It does not tell the jury that one side or the other possesses superior judgment. *See West*, 121 S.W.3d at 109. It does not tell one side to distrust its judgment. *See id.* It concludes with an instruction that the jurors are to "continue deliberations in an effort to arrive at a verdict that is acceptable to all member[s] of the jury if [they] can do so without violating [their] conscience." *See id.* We hold that the *Allen* charge in this case was not coercive.

Having held there was no error in the timing or in the form of the *Allen* charge, we overrule Appellant's second issue.

Whether the Allen *Charge Violated Article 36.16*

In his third issue, Appellant contends that the *Allen* charge violated article 36.16 of the code of criminal procedure, which provides in relevant part:

> After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony, and in the event of such further charge, the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 36.15. The failure of the court to give the defendant or his counsel a reasonable time to examine the charge and specify the ground of objection shall be subject to review either in the trial court or in the appellate court.

Tex. Code Crim. Proc. Ann. art. 36.16.[3] Appellant contends that where, as here, the jury merely inquired about what would happen in the event it became deadlocked, a supplemental charge was not authorized under article 36.16.

We disagree. The trial court added the *Allen* charge in response to the jury's request for additional information. A supplemental charge in response to a request by the jury is authorized under article 36.16. *See id.* To the extent Appellant repeats his argument that the jury note posed only a hypothetical question, we stand by our analysis of Appellant's second issue. *See generally Warren*, 2012 WL 5447957, at *2; *Voelkel*, 629 S.W.2d at 246–47.

We overrule Appellant's third issue.

[3]Additionally, the court of criminal appeals has consistently held that a trial court may withdraw and correct its charge if convinced an erroneous charge has been given. *Roberson v. State*, 113 S.W.3d 381, 384 (Tex. App.—Fort Worth 2003, pet. ref'd). Correcting an erroneous charge was not, however, the basis for the supplemental charge in this case.

Conclusion

Having overruled Appellant's three issues, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: February 23, 2017