In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00175-CR

PETER OLSEN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 361st District Court
Brazos County, Texas
Trial Court No. 16-01741-CRF-361, Honorable Steven Lee Smith, Presiding

August 21, 2019

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Appellant Peter Olsen was indicted in Brazos County for three counts of aggravated robbery.[1] A jury trial resulted in his conviction on each count and punishment of life in prison for each count. Appellant appeals through five issues. We will overrule the issues and affirm the trial court's judgment.

[1] TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2019).

Background

On the night of January 23, 2016, Maria Rosales was at work as manager of Pepe's Restaurant in Bryan. Her husband Daniel Ramirez was in the restaurant as closing time approached. Two men with guns drawn entered the restaurant and announced a robbery. One of the robbers wore a black hooded jacket, dark blue jeans with distinctive stitching on the rear pockets, white tennis shoes, and a camouflage face mask. He also appeared to wear gloves. According to testimony, the robber wearing the camouflage mask was smaller in stature than the other, who was described as taller and "bulkier."

One of the robbers pointed a pistol at Daniel Ramirez and took his wallet after directing him to the floor. Ramirez testified he experienced fear as the pistol was pointed at his face. He heard one of the robbers threaten to kill his wife.

The smaller of the two robbers told Maria Rosales she had thirty seconds to open the restaurant safe or he would shoot her. According to Maria Rosales, the smaller robber appeared to be in charge of the robbery. That robber pointed a gun at Maria Rosales and another employee, Maria Ramirez. Maria Rosales agreed she experienced fear when he pointed a gun at her.

Maria Rosales was able to open the floor safe and the robbers took the money it contained along with the money trays from two cash registers. After the robbers departed, she telephoned 911 and police quickly arrived.

Bryan police officer Curtis Barber responded to the robbery call. From the three victims, he obtained a description of the robbers as well as their method and direction of travel. Officers also viewed the restaurant's security video.

Gerardo Contreras, along with his wife and children, lived near Pepe's. Shortly after the two robbers departed Pepe's, Contreras and his family were returning to their home after having dinner out. As they neared their home Contreras saw two men in hooded jackets, wearing "blue/purple surgical" gloves running in the street. One of the men wore a camouflage mask. The other carried a black box. Thinking the men were burglars, Contreras told his wife to call the police.

As Contreras backed his vehicle into the driveway of the family's home, one of the men fired a handgun at his vehicle. Contreras testified he saw a "muzzle flash." Contreras described the shooter as of slender build, wearing a gray hooded jacket, with a hood over his face and a camouflage mask, and purple or blue gloves. The gunman pointed a handgun back and forth between Contreras and his wife. Contreras heard other shots as he put his vehicle in drive and drove toward the gunman, almost striking him as he sped away. None of the Contreras family was injured. Near the Contreras home police collected three shell casings manufactured by Hornady for a 9-millimeter handgun.

Shortly before 3:00 a.m. on January 24, 2016, Texas Department of Public Safety trooper Garrett Burkhart was stopped beside Highway 6 in Brazos County assisting another officer. A Cadillac CTS automobile traveling at 75 miles an hour passed Burkhart's parked patrol vehicle without slowing down or moving to the outside lane. Seeing what he believed was a traffic violation, Burkhart pursued the Cadillac in his patrol

vehicle, but was unable to match its speed which Burkhart testified was over 135 miles an hour. At times during the pursuit the driver of the Cadillac turned off the vehicle's lights. The Cadillac exited the highway and continued through College Station at high speed with its lights off. With Burkhart in pursuit, the Cadillac ran a red light and collided with another vehicle. Evidence showed the collision occurred at approximately 3:00 a.m.

The impact severely damaged both vehicles. When the Cadillac came to rest, its driver left the vehicle and ran from the scene. Burkhart gave chase on foot but was unable to catch the fleeing individual and did not observe the person long enough to make a positive identification. At trial, Burkhart testified the person he pursued was of small or medium build and that the person's build was consistent with that of appellant.

After his failed foot pursuit of the Cadillac's driver, Burkhart returned to the scene of the collision. A records check showed the Cadillac was registered to appellant whose address was 3707 Warren Circle in Bryan. Inside the Cadillac, the trooper found appellant's identification card, also showing his address as 3707 Warren Circle.

Bryan police officer Kole Taylor investigated the Pepe's robbery and the Contreras' shooting. He testified he and other officers formed the belief that the Pepe's robbers were also the ones who fired at the Contreras family. Having no idea the Cadillac collision and the robbery might be connected, Taylor went to the Warren Circle address to check on the wellbeing of the Cadillac driver and assist other officers. He also wanted to locate the driver to investigate the suspected offenses of evading arrest and aggravated assault with a motor vehicle.

Taylor arrived at the Warren Circle residence about 3:30 a.m. where he joined officer Nathan Dera. When Taylor knocked on the front door, Crystal Prado answered and identified herself as a house sitter for appellant's father, Mike Olsen. She said she and appellant were involved in a dating relationship. Prado voluntarily allowed the officers into the Olsen house. In a living area, Taylor noticed a pair of blue jeans lying on the floor in the middle of "an otherwise very clean, well-kept house." He noted that the back pockets had "a very distinct like group of strings hanging or dangling from them." He agreed they reminded him of those worn by one of the Pepe's robbers.

When Prado noticed Taylor's interest in the jeans she quickly gathered them, tossed them down the hall, and told the officers to leave. In Taylor's opinion, she seemed extremely nervous. When Taylor asked to examine the jeans Prado complied by retrieving a different pair of jeans. Taylor then specifically requested the jeans that had been lying on the floor. Prado willingly produced the correct jeans. Taylor photographed the jeans and compared them with those he saw in the Pepe's surveillance video. He testified he was "100 percent" certain the blue jeans were those worn by a Pepe's robber.

Taylor further testified that when he and Dera left the Warren Circle residence he believed appellant was inside the house. The officer therefore began looking through its windows. Taylor said through a kitchen window he saw a "flat-billed, baseball-style hat along with a bunch of crumpled up cash on the countertop and there was a pair of like Air Jordan-type tennis shoes." Taylor testified these items drew his attention because one of the Pepe's robbers wore such clothing. Taylor also saw a camouflage mask matching the mask he saw one of the Pepe's robbers wearing in the security video.

Police obtained a warrant to search the house. While executing the warrant they seized the clothing items Taylor described, a 9-millimeter handgun with a cartridge in the chamber and two more in the magazine, a box of Hornady 9-millimeter ammunition missing fourteen bullets, Nitrile gloves, latex gloves, an empty glove box, and a gray hooded sweatshirt.

Bryan police detective Travis Hines assisted in executing the warrant. He testified to his opinion the pair of jeans officers seized, which bore a distinctive stitching pattern on the rear pockets with frayed tassels hanging from each pocket, were identical to those worn by the Pepe's robber depicted in still photographs drawn from the restaurant surveillance video. Hines further testified that the handgun officers seized was like the one used by the smaller Pepe's robber. He supported this opinion by noting "the angle where the trigger is and the silver mechanism on the top of the gun" matched.

Bryan police detective Stephen Davis investigated the shots fired at the Contreras family. He found the three Hornady shell casings outside their residence. Davis testified he compared the casings with a bullet loaded in the chamber of the handgun seized in the search of the Warren Street residence. In his opinion, the bullet and the casings matched. According to Hines, Hornady ammunition is expensive and seldom used in criminal conduct.

Jennifer Gongora dated appellant in high school and they are the parents of a child. On January 24, 2016, she received a Facebook message through a third party. Attached was a television news video concerning the high-speed chase and collision. The sender of the message used the identifier, "pistolzpete52hgc." Attributing the message to

appellant, Gongora interpreted the street slang of the message for the jury. The message referred to guns, money, and appellant's responsibility for the car chase reported in the linked news article.

Appellant was arrested on February 6, 2016.

Analysis

Sufficiency of the Evidence

By his first issue appellant asserts the evidence was insufficient to identify him as one of the Pepe's robbers.

We review the sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to 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, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). An appellate court gives deference to the responsibility of the factfinder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams v. State,* 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). However, the reviewing court's duty requires it to "ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Id.* An appellate court reviewing the sufficiency of the evidence to support a conviction considers all the evidence in the record, whether direct or circumstantial, and whether properly or improperly admitted. *See Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in

establishing the guilt of an actor and the standard of review on appeal is the same for both direct and circumstantial evidence cases. *Guevara v. State,* 152 S.W.3d 45, 49 (Tex. Crim. App. 2004); *Smith v. State,* 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The State may prove a defendant's identity and criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Jenkins v. State,* 493 S.W.3d 583, 599 (Tex. Crim. App. 2016).

The factfinder is entitled to judge the credibility of the witnesses, and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State,* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *see also Wise v. State,* 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) ("The factfinder exclusively determines the weight and credibility of the evidence"). When there is conflicting evidence, a reviewing court must presume the factfinder resolved the conflict in favor of the verdict, and defer to that resolution. *Jackson,* 443 U.S. at 326; *Blea v. State,* 483 S.W.3d 29, 33 (Tex. Crim. App. 2016).

The smaller Pepe's robber wore a hooded sweatshirt, a camouflage mask, blue jeans with frayed pockets and distinctive stitching on both rear pockets, blue or purple surgical gloves and white tennis shoes. In the immediate vicinity of the robbery, shortly after the robbers left Pepe's, Gerardo Contreras and his family were fired on by one of two individuals. The shooter was slender and wore a gray hooded sweatshirt with the hood over his head, a camouflage mask, and purple or blue gloves. Several hours after the Pepe's robbery the driver of a Cadillac automobile refused to stop for a traffic violation and led a state trooper on a high-speed chase into College Station. When the Cadillac ran a red light and struck another vehicle, its driver fled on foot. While the driver eluded

the pursuing trooper in the foot chase, the trooper was able to testify the person he pursued was of small or medium build, like appellant. The Facebook message Gongora received the next day connected appellant with the police chase and collision. The Cadillac was registered to appellant and contained his identification card. The registration and identification card listed appellant's address as a particular residence on Warren Circle in Bryan. On reaching the residence, officers were admitted by Prado who identified herself as the house sitter for appellant's father. In the house, in plain view, an officer who had already watched the security camera video of the Pepe's robbery noticed a pair of jeans on the floor that matched those worn by one of the robbers. In addition to the distinctive blue jeans, officers found some cash, a camouflage mask, a pair of white tennis shoes, a handgun like that in a still photo drawn from the robbery video, and a box of ammunition with fourteen missing shells. The seized handgun contained the same caliber and brand of ammunition. Shell casings from the scene of the Contreras shooting were of the same caliber and brand as the ammunition found in appellant's house and loaded in the seized handgun. From a photograph drawn from the surveillance video, the gray hooded sweatshirt found in the house appeared identical to the hooded sweatshirt worn by one of the robbers. Officers also found blue or purple latex-style gloves in appellant's house.

Considered in the light most favorable to the verdict, the evidence permitted a rational jury to conclude beyond a reasonable doubt that appellant was one of the Pepe's robbers. *See Hooper,* 214 S.W.3d at 13 (jury's responsibility to draw reasonable inferences from the evidence). Accordingly, we overrule appellant's first issue.

Motion to Suppress Evidence

By his second issue, appellant argues the trial court erred by failing to suppress items seized by officers at the Olsen residence. The State argues in response that appellant waived his complaint that the trial court erred by denying his motion to suppress. Although appellant filed a pretrial motion to suppress the items police seized from his residence and later filed an amended motion, no pretrial hearing was held on either motion.

On the morning of trial, the court called for hearing appellant's motion to suppress. After learning the motion had not been heard, the court initially announced it would take up the motion after the jury was selected but before it was sworn. The State argued holding a separate hearing would require a large amount of evidence. It asked the court to carry the motion with the trial "and make the ruling as the trial goes along just to save time and be more efficient." The court ruled, "I'm going to . . . carry it along given where we are now. Had I been made aware earlier, we could have had a hearing earlier, but nobody told me."

During the State's presentation of its case-in-chief, appellant did not object when Taylor testified concerning his discovery of various items of evidence inside appellant's home that matched what he saw on the security video of the Pepe's robbery. The items were the pair of jeans with distinctive stitching, a "flat-billed, baseball-style hat along with a bunch of crumpled up cash on the countertop and . . . a pair of like Air Jordan-type tennis shoes" and a camouflage mask.

Appellant voiced "no objection" when photographs of the following items were admitted through the testimony of crime scene technician Eric Henderson: a pair of jeans; a pair of white Air Jordan basketball shoes; a 9-millimeter handgun; Hornady 9-millimeter cartridges; a camouflage mask; a box of Hornady 9-millimeter ammunition; Nitrile gloves or latex surgical gloves; an empty Nitrile glove box; and a gray hooded sweatshirt. Henderson also testified without objection to his recovery of the same items from the house.

Appellant's first objection to the items seized from his residence came when the handgun and other physical items were offered.

A motion to suppress evidence is "nothing more than a specialized objection to the admissibility of that evidence." *Black v. State,* 362 S.W.3d 626, 633 (Tex. Crim. App. 2012); *Sanders v. State,* 387 S.W.3d 680, 686 (Tex. App.—Texarkana 2012, pet. struck). Merely filing a motion to suppress does not preserve error in the admission of the evidence sought to be suppressed. *Coleman v. State,* 113 S.W.3d 496, 499-500 (Tex. App.—Houston [1st Dist.] 2003)*, aff'd on other grounds,* 145 S.W.3d 649 (Tex. Crim. App. 2004). Preservation-of-error rules require that the record demonstrate both a timely and specific request, objection, or motion stating the complaint and an adverse ruling by the trial court. *Gomez v. State,* No. 07-16-00156-CR, 2017 Tex. App. LEXIS 9239, at *3-4 (Tex. App.—Amarillo Sept. 29, 2017, no pet.) (mem. op., not designated for publication) (citing TEX. R. APP. P. 33.1(a)). Generally, if the trial court has not ruled on a motion to suppress when the challenged evidence is offered at trial, a defendant must object to the evidence when it is offered in order to preserve a claim of error. *Sanders,* 387 S.W.3d at

686 (citing *Ross v. State,* 678 S.W.2d 491, 493 (Tex. Crim. App. 1984) and *Ortiz v. State,* 930 S.W.2d 849, 855 (Tex. App.—Tyler 1996, no pet.)).

The Court of Criminal Appeals found a suppression issue was preserved under the "special circumstances" presented when the trial court "essentially directed [the defendant] to wait until all the evidence was presented before he obtained any ruling" on his motion to suppress. *Garza v. State,* 126 S.W.3d 79, 84 (Tex. Crim. App. 2004). The court noted also that the motion to suppress involved an issue that would have been completely decisive of the case. *Id*. at 85. It said its holding was not meant to apply in situations outside the special circumstances described. *Id*.

Neither of the special circumstances described in *Garza* is present here. In announcing its decision to carry the motion to suppress with the trial, the court did not state that it would not rule on the motion until it had heard all the evidence. Nor would a ruling on the motion to suppress necessarily be dispositive of the State's case against appellant. *See Person v. State,* No. 02-18-00156-CR, 2018 Tex. App. LEXIS 3532, at *8 (Tex. App.—Fort Worth May 17, 2018, pet. ref'd) (mem. op., not designated for publication) (explaining and distinguishing *Garza).* Because filing the motion to suppress without obtaining an adverse ruling preserved nothing for appellate review, because the trial court did not instruct the attorneys that it would not rule on the motion until it had heard all the evidence, and because appellant did not object to the challenged evidence at the earliest opportunity during trial, we find he forfeited his complaint. His second issue is overruled.

Request for Article 38.23 Instruction in Jury Charge

In his third issue, appellant asserts that the trial court erred by denying his request for an instruction in the jury charge pursuant to article 38.23 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2018). The gist of appellant's complaint is the instruction was necessary in order for the jury to resolve factual disputes material to determining whether officers unlawfully seized items from the Olsen residence.

A claim of error in the jury charge is reviewed under the standard of *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). *See Barrios v. State,* 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) (discussing *Almanza* standard). We first determine whether the charge contains error. *Ngo v. State,* 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error is present, we determine whether it is harmless under the applicable standard. *Barrios,* 283 S.W.3d at 350 (citing *Almanza,* 686 S.W.2d at 171).

The Texas exclusionary rule is codified in Article 38.23(a) of the Code of Criminal Procedure which provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a). To obtain an article 38.23(a) instruction the defendant must meet three requirements: (1) the evidence heard by the jury must raise an issue of fact, (2) the evidence on that fact must be affirmatively contested, and (3) that

contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. *Daniel v. State,* 547 S.W.3d 230, 242 (Tex. App.—Eastland 2017, no pet.) (citing *Madden v. State,* 242 S.W.3d 504, 510 (Tex. Crim. App. 2007)).

At trial, appellant did not timely object to admission of evidence of the items seized in the Olsen home which he now argues were taken in violation of the Constitution. He maintains the jury should have resolved the question after receiving an article 38.23(a) instruction. Because evidence of these items was before the jury without objection we find there was no contested issue of material fact for the jury to resolve and the trial court was therefore not required to include an article 38.23(a) instruction in its charge. In *Jackson v. State,* 888 S.W.2d 912, 913-14 (Tex. App.—Houston [1st Dist.] 1994, no pet.) the appellant challenged a conviction for possession of cocaine, arguing that the police obtained the drugs as a result of an illegal search and seizure. *Id.* at 913. The court of appeals found Jackson waived the right to complain about the admission of the drugs and various paraphernalia by his failure to object when the State first tendered the items into evidence. *Id.* at 914. "Since appellant waived the right to complain about the admission of the crack pipe and matchbox, we find that the trial court did not err in refusing to place appellant's requested [article 38.23] instruction in the court's charge." *Id*. at 914. For a similar holding *see also Rogers v. State,* No. 06-05-00083-CR, 2006 Tex. App. LEXIS 5690 (Tex. App.—Texarkana June 30, 2006, pet. ref'd) (mem. op., not designated for publication); *Lemons v. State,* 135 S.W.3d 878 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Lockett v. State,* No. B14-92-00938-CR, 1994 Tex. App. LEXIS 2568 (Tex. App.—Houston [14th Dist.] Oct. 20, 1994, no pet.) (unpublished opinion). The trial court did not

err in refusing to submit appellant's requested article 38.23(a) instruction. Appellant's third issue is overruled.

Authentication of Facebook Message

Through his fourth issue appellant argues the Facebook message attributed to appellant was erroneously admitted during the guilt-innocence phase of trial because it was not properly authenticated.

On January 24, 2016, the day after the Pepe's robbery, Gongora received a Facebook message. In the upper right corner appeared the name "Yesenia Rodriguez." The body of the message was written in cryptic street language and included the identifier "pistolzpete52hgc." Attached to the message was a video link to a television news report of the early-morning Cadillac crash in College Station.

When the State offered a copy of the message through Gongora, appellant objected on authenticity grounds. The court overruled the objection. According to Gongora, the writing style was like appellant's and she knew of no one else who would message her on Facebook and refer to themselves as "pistolzpete." Gongora testified she believed the message "refer[red] to I have a gun and I'm going to get some money . . . . Running the streets." The message's author was "glad that [Gongora] was doing good" and "whoever is coming after [the author, the author is] going to go guns blazen (sic)." The author "was no good and [Gongora was] doing a lot better."

An appellate court applies the abuse of discretion standard to determine whether evidence was properly authenticated. *Tienda v. State,* 358 S.W.3d 633, 638 (Tex. Crim. App. 2012); *Montgomery v. State,* 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on

reh'g); *Campbell v. State,* 382 S.W.3d 545, 549 (Tex. App.—Austin 2012, no pet.). "A trial court does not abuse its discretion when it reasonably believes that a reasonable juror could find that the evidence has been authenticated," and "[i]f the trial court's ruling is at least within the zone of reasonable disagreement, we will not interfere." *Campbell,* 382 S.W.3d at 549 (quotation marks omitted) (citing *Druery v. State,* 225 S.W.3d 491, 502 (Tex. Crim. App. 2007)).

"To satisfy the requirement of authentication or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). Whether an item's proponent has "crossed this threshold" is a preliminary question of admissibility described in Rule 104(a). *Tienda,* 358 S.W.3d at 638 (citing TEX. R. EVID. 104(a) & 901(a) and citing *Druery*, 225 S.W.3d at 502). Performance of the trial court's Rule 104 gatekeeping function does not require the trial court to be persuaded that the proffered evidence is authentic. *Tienda*, 358 S.W.3d at 638. "The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic." *Id.* Ultimately, it is for the jury to determine whether an item of evidence is in fact what its proponent claims. *Butler v. State,* 459 S.W.3d 595, 600 (Tex. Crim. App. 2015) (citing *Tienda,* 358 S.W.3d at 638).

Evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with other circumstances surrounding the creation of that evidence. *Johnson v. State,* No. 07-16-00233-CR, 2018 Tex. App. LEXIS 1817, at *5 (Tex. App.—Amarillo Mar. 12, 2018, no pet.) (mem. op., not

designated for publication) (citing TEX. R. EVID. 901(b)(4)). Social media posts may be authenticated with evidence making reference to specific details only the claimed author would know, messages referring to an alleged incident, and unique photos of the supposed author. *Tienda,* 358 S.W.3d at 638.

Here Gongora, who had a child with appellant, testified she was familiar with the writing style depicted in the message and it was like that of appellant. She knew of no one else who would message her on Facebook and use the name pistolzpete. When she looked up Yesenia Rodriguez on Facebook she discovered photographs depicting Rodriguez and appellant together. It was undisputed that appellant's vehicle was involved in the collision described in the attached news video. In the end, whether appellant authored the message was a question of fact for the jury. *Tienda,* 358 S.W.3d at 638. We cannot say the trial court abused its discretion in finding the Facebook message sufficiently authenticated. Appellant's fourth issue is overruled.

Claim of Fundamental Error in Punishment Jury Charge

By his fifth issue, appellant argues the trial court's charge on punishment contained an erroneous instruction on the law of parole eligibility. Appellant did not object to the charge on the ground he now urges and therefore contends the court's error caused him egregious harm. *See Almanza,* 686 S.W.2d at 171 (explaining egregious-harm analysis). We agree the charge contained an erroneous statement, but we see no merit to the egregious-harm argument.

Reversal on a claim of egregious harm is possible "only if the error was fundamental in the sense that it was so egregious and created such harm that the

defendant was deprived of a fair and impartial trial." Charge error also is egregiously harmful "if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Villarreal v. State,* 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); *Almanza,* 686 S.W.2d at 171-72. The harm must be actual rather than theoretical. *Villarreal,* 453 S.W.3d at 433.

Because aggravated robbery is an offense described by article 42A.054(a) of the Code of Criminal Procedure, appellant is not eligible for release on parole from his life sentence until his actual calendar time served, without consideration of good conduct time, equals one-half of his sentence or 30 calendar years, whichever is less. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.054(a)(10) (West 2018); TEX. GOV'T CODE ANN. § 508.145(d)(1)(A), (d)(2) (West Supp. 2018). The court therefore was required to instruct the jury regarding parole eligibility with the charge set out in Code of Criminal Procedure article 37.07, § 4(a), including its statement that if "sentenced to a term of imprisonment the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time the defendant may earn." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (West Supp. 2018).

The court's instructions to the jury on punishment included a complete statement of the subsection 4(a) charge, but stated the sentence regarding parole eligibility in these words:

> 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-half of the

> sentence imposed or thirty (30) years, whichever is less, without any consideration of good time credit.[2]

The jury thus was given the contradictory information that appellant's parole eligibility would be calculated "without any consideration of good time credit," but that "any good conduct time earned" would be included in the calculation.

Appellant posits that, with regard to imprisonment, the jury's discretion in this case was limited to setting a term of imprisonment within the range of fifteen years to 99 years or life. Under the charge, appellant argues, the jury was led to believe, erroneously, that good conduct time would play a part in appellant's eligibility for parole. The court's misstatement of law under these circumstances, he urges, should compel us to conclude he was egregiously harmed. From our review of the record, we cannot agree.

When charge error is shown, whether it caused the defendant egregious harm requires a reviewing court take into account 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 trial record as a whole. *Villarreal,* 453 S.W.3d at 433. Considering whether an erroneous parole law instruction produced egregious harm in the defendant, the Waco Court of Appeals has identified four relevant factors gleaned from the case law: (1) the presumption that the jury followed the court's instructions; (2) whether there was a jury note regarding parole or good-conduct time; (3) whether the State emphasized the possibility of parole in argument; and (4) the severity of the defendant's sentence. *Hammons v. State,* No. 10-17-00037-CR, 2017

[2] Italics ours.

Tex. App. LEXIS 8718, at *4 (Tex. App.—Waco Sept. 13, 2017, no pet.) (mem. op., not designated for publication) (citing *Hooper v. State,* 255 S.W.3d 262, 271-72 (Tex. App.—Waco 2008, pet. ref'd); *Lopez v. State,* 314 S.W.3d 70, 73-74 (Tex. App.—Waco 2010, no pet.)).

The court in *Hammons* addressed an error more serious than is before us. Unlike the charge before us, containing an ambiguity regarding the role of good conduct time in the parole-eligibility determination, the trial court in *Hammons* mistakenly instructed the jury that the defendant would be eligible for parole when he served the lesser of one-fourth of the sentenced imposed or 15 years, with good conduct time added to his actual time served. 2017 Tex. App. LEXIS 8718, at *3. The correct charge was that under article 37.07, § 4(a), stating parole eligibility required imprisonment for the lesser of half the sentence imposed or 30 years, without consideration of good conduct time. *Id*.

The court noted the jury charge contained the paragraph from subsection 4(a) instructing that jurors could consider the existence of parole law and good conduct time, but were not to consider the extent to which good conduct time might be awarded to or forfeited by the defendant, or the manner in which the parole law might be applied to him. *Id*. The court further found nothing in the record overcame the presumption the jury followed that instruction. No jury note concerned those subjects, and the State did not mention them in its closing argument. The court found the seventy-five-year sentence imposed "not extreme considering the facts of the case." It concluded the erroneous parole law instruction did not cause the defendant egregious harm. *Id*.

The Court of Criminal Appeals reached the same conclusion in a like situation, also involving a charge mistakenly stating the defendant would be eligible for parole after serving one-fourth the sentence, taking good conduct time into account, rather than the correct eligibility requirement of actual time served, without considering good time, of one-half the sentence. *Igo v. State*, 210 S.W.3d 645, 646 (Tex. Crim. App. 2006). The court cited the presence of the "standard curative language" telling the jury not to consider the extent to which parole law might be applied to the defendant; the absence of jury argument concerning parole; and the "exceptionally strong" punishment evidence. *Id*. at 647-48. Although the defendant received the maximum sentence of imprisonment, the court found the stated factors mitigated against a finding of egregious harm. *Id*. at 647; *see also Hooper*, 255 S.W.3d at 270-73 (evaluating impact of parole-eligibility charge error and finding no egregious harm); *Soria v. State,* Nos. 07-10-00161-CR, 07-10-00162-CR, 07-10-00163-CR, 2012 Tex. App. LEXIS 3345, at *20 (Tex. App.—Amarillo Apr. 27, 2012, pet. ref'd) (mem. op., not designated for publication) (finding no actual harm in erroneous parole eligibility instruction under "some harm" standard).[3]

Here, the jury assessed a life sentence for each of the three counts. But the jury heard punishment evidence that might also be characterized as exceptionally strong. The State's punishment-stage evidence included the testimony of Jennifer Gongora. She told

[3] In his appellate brief, appellant argued our analysis should be guided by a 2000 opinion of the Texarkana Court of Appeals holding that an erroneous parole-eligibility instruction was not cured by an instruction not to consider how parole law applied to the defendant. *Hill v. State,* 30 S.W.3d 505, 508-09 (Tex. App.—Texarkana 2000, no pet.). At oral argument in this appeal, and by letter brief, appellant has made us aware that the Texarkana court recently expressly recognized that its opinion in *Hill* is no longer good law. *Murrieta v. State*, __ S.W.3d __, __, No. 06-18-00163-CR, 2019 Tex. App. LEXIS 3583, at *10 (Tex. App.—Texarkana May 3, 2019, no pet).

the jury of events that occurred when she was 16 and pregnant with appellant's child. Appellant threatened to cut their unborn child from her body and more than once hit her in the stomach. Gongora also testified that, years later but just days after the Pepe's robbery, through social media, appellant sent the message he knew her location and intended to kill her. She tearfully testified how she and her husband guarded their home and children through the night "waiting for someone to kick the door in." A juvenile probation officer testified appellant was committed to the Texas Youth Commission as a juvenile but the system was unable to accomplish rehabilitation. A police officer testified appellant, in 2010, carried a handgun to a high school football game. When the officer attempted to arrest appellant for outstanding warrants, appellant fled. Eventually appellant was captured and convicted for evading arrest and possessing a weapon in a prohibited place. Detective Hines testified that appellant was charged with the aggravated robbery of a business that occurred two days before the Pepe's robbery. Sunita Contreras described for the jury the emotional impact on her two children of the shots fired at their vehicle as they arrived at their home just after the Pepe's robbery. The two occupants of the vehicle struck by appellant's Cadillac testified to their injuries and their effects.

The jury heard testimony of appellant's conduct in the county jail awaiting trial. Appellant threatened jailers. Once he exposed his genitals and masturbated in front of a female detention officer. A jailer testified appellant threw a bowl of urine on him. Another jailer testified appellant told her of his intention to urinate on the jury during trial. Another testified that appellant said he intended to assault his former lawyer for leaving him in jail and to "run for it" when he was taken to court. A jail nurse testified appellant made sexual

comments to her and urged prisoners in another cell block to attack her. On one occasion when appellant was moved to "the violent cell," a jailer recalled, appellant profanely threatened to sexually assault the jailer's mother and his wife.

Evidence showed jailers intercepted a letter appellant wrote encouraging acquaintances to commit robberies to raise money for his bail. Other evidence by jailers showed appellant accessed a jail computer and lowered the recorded amount of his bail from $460,000 to $42,000, although he was not released on the altered amount. A psychologist testifying for appellant diagnosed appellant with anti-social personality disorder. He agreed the symptomology includes such things as a complete disregard for society's rules and laws and complete disregard for other people.

All that evidence, added to that showing the circumstances of the aggravated robbery and the apparently gratuitous gunfire aimed at the Contreras family, the reckless driving that led to the Cadillac crash hours after the robbery, and his previous felony conviction for assault on a public servant, provided the jury with a compelling case supporting the life sentences jurors imposed.

The matter of parole and good conduct time was not mentioned in the State's closing argument. The jury sent out a note during its punishment deliberation, inquiring about a fine (which it did not impose). It asked nothing about parole or good conduct time.

The punishment evidence gave the jury little reason to speculate on the impact of possible good conduct time on appellant's parole eligibility. The court's charge instructed the jury not to consider the potential application of good conduct time or the parole law to

appellant. We see no reason jurors would not have followed that instruction. No egregious harm is shown from the court's mistaken instruction that appellant's eligibility for parole might be affected by good conduct time.

Appellant's fifth issue is overruled.

Conclusion

Having overruled each of appellant's issues, we affirm the judgment of the trial court.

James T. Campbell
Justice

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