In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-11-00042-CR

BRANDI EDWARDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 336th Judicial District Court
Fannin County, Texas
Trial Court No. 20023

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Brandi Edwards was convicted by a jury of one count of aggravated sexual assault and one count of indecency with her daughter, A.R.W, who was then five years old. On the first count (sexual assault), Edwards was sentenced to sixty years' imprisonment and ordered to pay a $10,000.00 fine. On the second count (indecency), she was sentenced to twenty years' imprisonment and was likewise ordered to pay a fine of $10,000.00.

On appeal, Edwards argues that the jury charge erroneously included a manner and means not alleged in the indictment and complains of admission of testimony by a sexual assault nurse examiner (SANE) relating some of A.R.W.'s statements made during an examination.

We affirm the trial court's judgment.

I. Complaint of Jury Charge Error

The complaint on appeal arises because the conduct listed in the indictment in the aggravated sexual assault charge alleged that there was penetration on Edwards' part "by the finger," whereas a reference in the jury charge directed the jury to find that Edwards was guilty of aggravated sexual assault if it found that she intentionally or knowingly penetrated the child with her "finger or a stick." (As the State concedes, Edwards is correct that the charge was erroneous "because the charge contains the unindicted manner and means of 'a stick' and allows conviction if the jury believe[d] appellant penetrated [A.R.W.'s] sexual organ with either her finger or a stick."). Although no objection to this charge was raised by Edwards at trial, Edwards argues on appeal that

this charge "authorized the jury to convict on either of two manners and means without requiring a unanimous agreement on either of them."

Our review of error in this jury charge involves a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994); *see also Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009); *Barnett v. State*, 344 S.W.3d 6, 25 (Tex. App.—Texarkana 2011, pet. ref'd). Initially, we determine whether error occurred, and then evaluate whether sufficient harm resulted from the error to require reversal. *Abdnor*, 871 S.W.2d at 731–32.

A person commits the offense of aggravated sexual assault if the person intentionally or knowingly causes the penetration of the sexual organ of a child by any means. TEX. PENAL CODE ANN. § 22.021(a)(B)(i) (West Supp. 2011). The indictment in this case alleged that Edwards "did intentionally or knowingly sexually assault [A.R.W.], a child younger than 14 years of age and not the spouse of defendant, by causing the sexual organ of [A.R.W.] to be penetrated by the finger of the defendant." Aggravated sexual assault is a conduct oriented offense. *Young v. State*, 341 S.W.3d 417, 422 & 423 n.20 (Tex. 2011) (citing *Huffman v. State*, 267 S.W.3d 902, 906 (Tex. Crim. App. 2008); *Vick v. State*, 991 S.W.2d 830, 832 (Tex. Crim. App. 1999) (aggravated sexual assault is a "conduct-oriented offense in which the legislature criminalized very specific conduct of several different types.")). Thus, "separately described conduct constitutes a separate statutory offense" and can be separately prosecuted. *Vick*, 991 S.W.2d at 832.

Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. *Cosio v. State*, No. PD-1435-10, 2011 WL 4436487, at *3 (Tex. Crim. App. Sept. 14, 2011); *see* TEX. CONST. art. V § 13. This means that the jury must "agree upon a single and discrete incident that would constitute the commission of the offense alleged." *Id.* (quoting *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007)). We concur with Edwards and the State that the jury charge was used in error when it used the phrase "either her finger or a stick," rather than saying only "with her finger."

We now decide whether the error was harmful. Edwards admits in her brief that she failed to object to the jury charge.

> The degree of harm necessary for reversal depends upon whether the error was preserved. Error properly preserved by an objection to the charge will require reversal "as long as the error is not harmless." We have interpreted this to mean *any* harm, regardless of degree, is sufficient to require reversal. However, when the charging error is not preserved a greater degree of harm is required. This standard of harm is described as "egregious harm."

Hutch v. State, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) (citations omitted).

Because Edwards did not preserve her complaint at trial, our analysis must address whether the charge error was so egregious and created such harm that it deprived her of a fair and impartial trial. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988); *Boones v. State*, 170 S.W.3d 653, 660 (Tex. App.—Texarkana 2005, no pet.). Egregious harm occurs where an error affects the very

basis of a case, deprives the defendant of a valuable right, vitally affects a defensive theory, or makes the case for conviction or punishment clearly and significantly more persuasive. *Boones*, 170 S.W.3d at 660 (citing *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)). When charge error causes a jury to render a less-than-unanimous verdict on an issue on which unanimity is required, the charge error is egregiously harmful. *See Ngo v. State*, 175 S.W.3d 738, 750–52 (Tex. Crim. App. 2005); *Swearingen v. State*, 270 S.W.3d 804, 812 (Tex. App.—Austin 2008, pet. ref'd). The egregious harm standard requires a finding of actual, not merely theoretical, harm to the accused. *Almanza*, 686 S.W.2d at 174.

Egregious harm is a difficult standard to meet and must be determined on a case-by-case basis. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). We consider the charge itself, the state of the evidence (including contested issues and the weight of the probative evidence), arguments of counsel, and the record as a whole in addressing harm. *Hutch*, 922 S.W.2d at 171.

In the court's charge, the jury was asked whether it found Edwards guilty "as charged in the indictment" (an indictment which made no reference to a stick). The evidence included a videotaped interview of the child with Michelle Griffith, to which no objection was lodged. This recorded interview contained the child's gestures and statements from which the jury could have found that Edwards penetrated A.R.W.'s sexual organ with her finger. Specifically, A.R.W. repeatedly stated that Edwards would do "nasty stuff" with her. When asked to describe the acts

to which she made reference, A.R.W. gestured in a manner indicating penetration of her female sexual organ by a finger. She orally clarified that "Momma did it till it tickled." Surprisingly, A.R.W. continuously asked Griffith if she could "participate in a sexual manner with her." A.R.W.'s assistant principal, Mary Lou Fox, also testified that A.R.W. stated she had sexual contact with Edwards. When asked to describe what sex was, Fox testified that A.R.W. "pointed more to her front -- her front area" and went on to say, "You do it real hard and it makes it tickle." There was no evidence offered of Edwards employing a stick in commission of the offense, and during closing argument, the State made no mention of penetration by a stick. Instead, the State argued correctly that "we undertook to prove that Brandi Edwards and no one else committed . . . aggravated sexual assault by penetrating the child's sexual organ with her fingers."

The state of the evidence, arguments of counsel, and the record as a whole do not suggest that Edwards suffered egregious harm from the inclusion of the objectionable phrase in the jury charge. Moreover, we have previously held that where, as here, there is no evidence of a lack of unanimity by the jury, harm resulting from an erroneous charge is not egregious. *Johnson v. State*, No. 06-10-00089-CR, 2011 WL 240875 at *4 (Tex. App.—Texarkana Jan. 26, 2011, pet. ref'd) (mem. op., not designated for publication).[1] Because nothing in the record indicated that the jury did not unanimously find that Edwards penetrated A.R.W.'s sexual organ with her finger, Edwards does not demonstrate actual (as opposed to theoretical) egregious harm.

[1] Although the unpublished cases have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

We overrule Edwards' first point of error.

II. Complaint of Admission of SANE Testimony

Edwards complains that SANE Jerri Larson was allowed to testify to statements made by A.R.W. during her medical examination over a timely hearsay objection and an explanation by the State that the following statements were made for purposes of medical diagnoses, excepting them from the hearsay rule:

> [A.R.W.'s] history, she – [A.R.W.] stated, "Momma did nasty stuff. She had sex with me. She took off all her clothes. My clothes were off." She said, "Oh, baby, [A.R.W.] I like and love you," and, "[A.R.W.], do sex with me. Momma touched my [female sexual organ] with her fingers, like this." And then [A.R.W.] was touching her vaginal area with her hands going in and out of her vaginal area.

The entire argument portion of Edwards' brief relating to this complaint states:

> Trial Counsel was correct. These are not statements for medical treatment or diagnosis. They are merely forensic evidence gatherings for trial and to allow use of the statements in a case such as this enables the statements of Complainant's to be admitted for all purposes and there is no effective way to cross-examine the statements.
>
> Appellant has found no case from the Sixth Court of Appeals,[2] but must disclose cases contrary to her position.

Edwards was obligated to provide this Court with "appropriate citations to authorities." TEX. R. APP. P. 38.1(i); *Tutt v. State*, 339 S.W.3d 166, 172 (Tex. App.—Texarkana 2011, pet. dism'd, untimely filed). She did not cite any caselaw to support her position; rather, Edwards cited only

[2]*See Prater v. State*, No. 06-07-00187-CR, 2008 WL 4191287 at * 1–2 (Tex. App.—Texarkana Sept. 15, 2008, pet. ref'd) (mem. op., not designated for publication) (admission of statements made to nurse by child complainant over hearsay objections not abuse of discretion since Rule 803(4) hearsay exception applied); *Darling v. State*, 262 S.W.3d 920, 924 (Tex. App.—Texarkana 2008, pet. ref'd) (same).

law which was contrary to her position. We find this issue has been inadequately briefed. "We may overrule any inadequately briefed point of error." *Tutt*, 339 S.W.3d at 172–73 (citing *Loun v. State*, 273 S.W.3d 406, 420 n.24 (Tex. App.—Texarkana 2008, no pet.)).

Edwards' final point of error is overruled.

III. Conclusion

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: November 1, 2011
Date Decided: November 18, 2011

Do Not Publish