TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00735-CR

Victor Rosales, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-DC-14-300723, HONORABLE JON N. WISSER, JUDGE PRESIDING

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

A jury convicted appellant Victor Rosales of the offense of aggravated sexual assault of a child and assessed punishment at 40 years' imprisonment.[1] The district court rendered judgment on the verdict. In four points of error on appeal, Rosales asserts that the district court abused its discretion in admitting certain evidence and erred in failing to instruct the jury during the punishment phase of trial that the jury must not consider extraneous-offense evidence unless it believed beyond a reasonable doubt that Rosales had committed the extraneous offenses. We will affirm the judgment of conviction.

[1] *See* Tex. Penal Code § 22.021(a)(2)(B).

BACKGROUND

The jury heard evidence that on October 25, 2013, Rosales sexually assaulted Y.R., his 13-year-old niece. Y.R. testified that on the day of the assault, Rosales picked her up from school to go shopping, made stops at a convenience store and a bank, and then drove her to a motel. According to Y.R., Rosales told her that he was planning on meeting someone in one of the motel rooms and asked her if she wanted to go inside with him. Y.R. agreed. Once they were inside the room, Y.R. recounted, she sat down on the bed and Rosales "started looking at [her] pretty weird," began asking her if she and her boyfriend had ever "done anything" sexual together, and then "grabbed" Y.R., "pinned [her] down" on the bed, took off her clothes, kissed her, and eventually penetrated her sexual organ with his.

Other evidence considered by the jury included the testimony of Y.R.'s mother, the first adult to whom Y.R. had reported the assault; Dahlia Alshahri, an employee at the motel where Y.R. claimed the assault had occurred, who testified that motel records showed that Rosales had checked into the motel on the date in question; Dr. Beth Nauert, a pediatrician who had examined Y.R. following the assault and observed a tear in Y.R.'s hymen that was "consistent with [Y.R.'s] history of a single episode of previous vaginal penetration"; Denise Baxindine, a social worker who had counseled Y.R. following the assault; and Detective Carey Chaudoir of the Austin Police Department, who had investigated the assault. Based on this and other evidence, which we discuss in more detail below, the jury found Rosales guilty of aggravated sexual assault of a child as charged and assessed punishment at 40 years' imprisonment as noted above. The district court rendered judgment on the verdict. This appeal followed.

ANALYSIS

Admissibility issues

In his first, second, and third points of error, Rosales asserts that the district court abused its discretion in admitting evidence of: (1) Y.R.'s change in demeanor and attitude following her outcry to her mother; (2) statements made by Y.R. during her counseling sessions with Baxindine; and (3) cash withdrawals that Rosales made from his bank on dates other than the date of the alleged assault. Rosales contends that evidence of Y.R.'s change in demeanor and Rosales's cash withdrawals were irrelevant and that certain statements made by Y.R. to Baxindine were inadmissible hearsay.

Standard of review

We review a district court's evidentiary rulings for abuse of discretion.[2] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[3] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[4]

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[2] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[3] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

[4] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)); *see Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).

Y.R.'s change in demeanor and attitude

Over Rosales's objection, the State elicited the following testimony from Y.R.'s mother:

> Q. [H]ave you noticed a change in [Y.R.] since she was finally able to tell you what happened?
>
> A. Yes.
>
> Q. What has the change been?
>
> A. It felt like she was freer, freer to be herself, be who she used to be, like she had taken a weight off of herself. There are times that she—maybe she thinks about it and it makes her sad, makes her upset.
>
> Q. Okay. And after she had told and after the investigation began, did the defendant continue to live close to you?
>
> A. Yes.
>
> Q. From what you observed, how did this affect [Y.R.]?
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> A. It affected her a lot because to go to school, the bus is close to where she was—had to go and she was afraid. And she would say, Mom, I don't know. I mean, this scares me. I don't know if he's going to come do something to my brother. She was more afraid for her brother.
>
> Q. Okay. And this was after she had told you what happened?
>
> A. Yes.

In his first point of error, Rosales asserts that the above evidence was not relevant to any issue in the case.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[5] "Thus, evidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant."[6] Moreover, "[e]vidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence."[7] "This broad definition lends itself to a liberal policy of admission of evidence for the jury's consideration."[8]

In a sexual-assault case, "the consequential fact is [whether] the complainant had been raped."[9] "Thus, any evidence that would tend to prove that fact or increase the jury's knowledge about that fact would be relevant."[10] However, when "there [is] no dispute that [the complainant] had been raped, . . evidence of her emotional difficulty after the rape would not alter the probability it occurred because that was not disputed."[11] In such a case, the evidence is irrelevant because "there [is] no logical relationship between the evidence and the consequential fact."[12]

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[5] Tex. R. Evid. 401.

[6] *Montgomery v. State*, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990).

[7] *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004).

[8] *Morales v. State*, 32 S.W.3d 862, 865 (Tex. Crim. App. 2000); *see Croft v. State*, 148 S.W.3d 533, 543 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

[9] *Brown v. State*, 757 S.W.2d 739, 740 (Tex. Crim. App. 1988).

[10] *Id*.

[11] *Id*.

[12] *Id*. at 741.

In this case, the district court would not have abused its discretion in finding that Rosales had disputed the occurrence of the assault. Rosales's defensive theory at trial was that no sexual assault had occurred at the motel and that any physical evidence tending to show that Y.R. had been assaulted was the result of Y.R. engaging in sexual intercourse with her boyfriend on another occasion. This theory was evident during Rosales's extensive cross-examination of Y.R., when he asked Y.R. multiple questions implying that she had lied to her parents regarding the extent of her relationship with her boyfriend and was also fabricating her account of the events that had transpired at the motel. It would not be outside the zone of reasonable disagreement for the district court to find that evidence of Y.R.'s emotional state following her outcry had at least some tendency to make it more probable that, contrary to Rosales's defensive theory, Y.R was telling the truth when she claimed that Rosales had sexually assaulted her at the motel.[13] Accordingly, we cannot conclude that the district court abused its discretion in admitting the evidence on that ground.

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[13] *See Gonzalez v. State*, 455 S.W.3d 198, 203-04 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (holding that evidence of "psychological trauma" to complainant was relevant because parties disputed whether trauma was caused by defendant or mother of complainant); *Yatalese v. State*, 991 S.W.2d 509, 511 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (holding that when "appellant argued to the jury that no offense occurred," evidence of complainant's "change in behavior after the offense tended to prove that the offense occurred" because "[a] change for the worse in the complainant's behavior after the offense is consistent with a traumatic event having befallen her"); *see also Villanueva v. State*, No. 05-14-01396-CR, 2016 Tex. App. LEXIS 4694, at *18 (Tex. App.—Dallas May 4, 2016, no pet.) (mem. op., not designated for publication) (concluding that evidence of complainant's emotional difficulties following assault was admissible "to show that the assaults had in fact occurred and rebutted [the] defensive theory that [the complainant] fabricated the allegations"); *Smith v. State*, No. 01-04-00604-CR, 2005 Tex. App. LEXIS 2723, at *17 (Tex. App.—Houston [1st Dist.] Apr. 7, 2005, pet. ref'd) (mem. op., not designated for publication) (testimony of complainant's mother that complainant was "scared" following the assault relevant when defendant contested "whether he took actions that allegedly placed the complainant in fear").

We overrule Rosales's first point of error.

Counseling records

During the testimony of Denise Baxindine, the social worker who had provided counseling services to Y.R., the district court admitted into evidence State's Exhibit 17, Baxindine's records of her counseling sessions with Y.R. In his second point of error, Rosales asserts that certain statements contained within the records were inadmissible hearsay.[14] In response, the State argues that the statements satisfy the "medical diagnosis or treatment" exception to the hearsay rule.[15]

Although not briefed by the parties, we must first address whether Rosales properly preserved error, if any, in the court below.[16] We conclude that he did not. The exhibit to which

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[14] *See* Tex. R. Evid. 801. In his brief, Rosales challenges the admissibility of the following statements:

> "Youth reported having trouble concentrating and feeling easily triggered since being sexually assaulted"; "Youth expressed regret over not being able to protect herself from the assault"; "Sexual abuse reported"; "Youth expressed anger over how case was being handled and how she was treated by the police officer"; "She described a nightmare involving the alleged perpetrator"; "She reported that whenever she goes outside alone, she is afraid he will sneak up behind her with a gun"; "She described the overwhelming emotions of sadness, anger, and worry she is experiencing"; "She expressed relief the legal process was moving forward"; "She expressed happiness at the possibility of her alleged perpetrator receiving justice"; "Youth stated her mood changes are linked to the trauma she experienced"; and "Youth discussed lasting effects of sexual abuse including feeling fearful to be alone and acting more closed and cautious with people."

[15] *See* Tex. R. Evid. 803(4); *Taylor v. State*, 268 S.W.3d 571, 587-91 (Tex. Crim. App. 2008); *Mbugua v. State*, 312 S.W.3d 657, 670-71 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

[16] *See Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009) (observing that "a court of appeals should review preservation of error on its own motion"); *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005) (stating that "preservation of error is a systemic requirement that must be reviewed by the courts of appeals regardless of whether the issue is raised by the parties").

Rosales objected contained 47 pages of printed and handwritten notes, forms, and other documents containing dozens of statements (some written in English and others written in Spanish) summarizing what both Y.R. and Baxindine had said during the course of their counseling sessions. Our review of the exhibit reveals that the records contained at least some evidence that the district court would not have abused its discretion in admitting. Specifically, at least some of the statements described Y.R.'s thoughts and emotions at the time of the sessions and thus would have been admissible under the "then-existing mental, emotional, or physical condition" exception to the hearsay rule.[17]

It is well established that when an exhibit contains both admissible and inadmissible material, the burden is on the objecting party to specifically point out which portion of the exhibit is inadmissible; otherwise, any error in admitting specific portions of the exhibit is not preserved for review.[18] Thus, in order to preserve error, Rosales was required to identify for the district court which particular statements within the exhibits he considered inadmissible.[19] Although he has

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[17] *See* Tex. R. Evid. 803(3); *Martinez v. State*, 17 S.W.3d 677, 688 (Tex. Crim. App. 2000); *Salazar v. State*, 127 S.W.3d 355, 363 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); *see also Mims v. State*, No. 03-13-00266-CR, 2015 Tex. App. LEXIS 11578, at *16-19 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that some statements and drawings by complainants contained within their therapist's workbooks "reflected the girls' mental conditions or feelings" and thus "[i]t would not be outside the zone of reasonable disagreement for the district court to find that at least some of these drawings were admissible").

[18] *See Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009); *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995); *Human v. State*, 749 S.W.2d 832, 838 (Tex. Crim. App. 1988); *Brown v. State*, 692 S.W.2d 497, 501 (Tex. Crim. App. 1985); *Hernandez v. State*, 599 S.W.2d 614, 617 (Tex. Crim. App. 1980) (op. on reh'g).

[19] *See Whitaker*, 286 S.W.3d at 369 ("The trial court was not obligated to search through these [exhibits] and remove 'all of the inadmissible references so that the recorded statements only contained the admissible evidence.'"); *Sonnier*, 913 S.W.2d at 518 ("When an exhibit contains both

identified those statements in his brief on appeal, he failed to do so in the court below. Instead, he made a global hearsay objection to the entire exhibit, without specifying the statements that he found to be objectionable. Consequently, Rosales failed to preserve error, if any, in the court's admission of the challenged statements.[20]

Moreover, even if error had been preserved, and further assuming without deciding that the specific statements challenged on appeal were inadmissible, we could not conclude on this record that Rosales was harmed by their admission. Evidence admitted in violation of the rules of evidence is non-constitutional error.[21] We may not reverse a conviction for non-constitutional error unless the error affected the defendant's substantial rights.[22] "A substantial right is affected when

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admissible and inadmissible evidence, the objection must specifically refer to the challenged material to apprise the trial court of the exact objection."); *Hernandez*, 599 S.W.2d at 617 ("While it might be conceded that appellant's objection sufficiently stated grounds for the objection, it did not identify what was objected to."); *see also Barnes v. State*, 876 S.W.2d 316, 329 (Tex. Crim. App. 1994) ("The trial court was not required, in the face of a global hearsay objection, to cull through the [exhibit] and exclude whatever particular matters he may find there that meet that description."); *Moore v. State*, No. 14-09-00033-CR, 2009 Tex. App. LEXIS 9744, at *2-8 (Tex. App.—Houston [14th Dist.] Dec. 29, 2009, pet. ref'd) (mem. op., not designated for publication) (appellant objected to report of sexual assault nurse examiner in its entirety as hearsay; court concluded that appellant failed to preserve error by failing to "inform the trial court of the specific objectionable material" contained within report); *Cline v. State*, No. 03-07-0016-CR, 2008 Tex. App. LEXIS 2242, at *16-17 (Tex. App.—Austin Mar. 26, 2008, pet. ref'd) (mem. op., not designated for publication) (concluding that appellant failed to preserve error regarding inadmissible statements contained within ten pages of medical records when objection was to medical records in their entirety).

[20] *See* Tex. R. App. P. 33.1(a); *Whitaker*, 286 S.W.3d at 369; *see also Wilkinson v. State*, 523 S.W.3d 818, 826-27 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

[21] *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002); *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *Eggert v. State*, 395 S.W.3d 240, 244 (Tex. App.—San Antonio 2012, no pet.).

[22] *See* Tex. R. App. P. 44.2(b).

the error had a substantial and injurious effect or influence in determining the jury's verdict."[23] "In considering non-constitutional error, an appellate court must disregard the error if the court, 'after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'"[24] "[T]he reviewing court should consider the entire record when making this determination, including testimony, physical evidence, jury instructions, the State's theories and any defensive theories, closing arguments, and voir dire if applicable."[25] Other factors include whether the State emphasized the error, whether the erroneously admitted evidence was cumulative of other properly admitted evidence, and whether there is "overwhelming evidence of guilt."[26]

We first observe that before the records were admitted into evidence, Baxindine testified, without objection, to the substance of some of the statements that Rosales now challenges on appeal, including testifying that Y.R. was "triggered" by certain situations involving men and boys; that Y.R. had nightmares following the assault, including one that involved "the alleged trauma"; and that Y.R. had experienced feelings of sadness, hyper-vigilance, and fear, including "fear of going outside alone" and "fear that the perpetrator . . . would come up behind her with a gun." To the extent that the challenged statements contained within the records were cumulative of

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[23] *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)).

[24] *Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003) (quoting *Solomon*, 49 S.W.3d at 365).

[25] *Id*. (citing *Motilla*, 78 S.W.3d 3at 355).

[26] *Motilla*, 78 S.W.3d at 356-57; *Solomon*, 49 S.W.3d at 365; *Douthitt v. State*, 127 S.W.3d 327, 337 (Tex. App.—Austin 2004, no pet.).

Baxindine's unchallenged testimony, this weighs against a conclusion that Rosales was harmed by their admission.[27]

We further observe that the State did not emphasize the challenged statements during trial. Although the State mentioned the counseling records in its closing argument, it did not discuss in detail the specific statements challenged on appeal and focused instead on more generalized statements contained within the records that summarized Y.R.'s emotions following the assault. And, because the specific statements challenged on appeal were only a small fraction of the dozens of statements contained within the 47 pages of records that were submitted to the jury, this weighs against a finding that the challenged statements had a "substantial and injurious" effect or influence in determining the jury's verdict.

Finally, we observe that the evidence of guilt in this case can be fairly characterized as overwhelming. In addition to Y.R.'s detailed testimony, summarized above, describing the assault, key aspects of Y.R.'s account were corroborated by other evidence. Dahlia Alshari, a clerk at the motel where Y.R. claimed the assault had occurred, testified that motel records showed that Rosales had, on the day of the assault, checked into the specific motel room where Y.R. remembered being assaulted. Y.R. had also testified that Rosales had stopped at a bank on the way to the motel. Bank records admitted into evidence showed that Rosales had made a cash withdrawal of $600 on the day of the alleged assault, and motel records also showed that Rosales had paid for the room with

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[27] *See Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010); *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Leday v. State*, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998); *Burks v. State*, 876 S.W.2d 877, 898 (Tex. Crim. App. 1994); *Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986); *Campbell v. State*, 382 S.W.3d 545, 552-53 (Tex. App.—Austin 2012, no pet.).

cash. Moreover, Dr. Nauert testified that Y.R.'s physical examination following her outcry, which revealed a "transection in her hymen," was "consistent with [Y.R.'s] history of a single episode of previous vaginal penetration." Y.R. testified that she had never had sex prior to the assault, and this testimony was corroborated by Y.R.'s ex-boyfriend, who testified that, contrary to Rosales's claim, he and Y.R. had never had sex. Additionally, Y.R.'s mother testified that when she had confronted Rosales with Y.R.'s claim that Rosales had sexually assaulted her, Rosales told her, "It happened but nothing happened."

In sum, on this record, we have fair assurance that the error, if any, in admitting the challenged statements did not influence the jury, or had but a slight effect. Accordingly, we cannot conclude that Rosales was harmed by their admission.

We overrule Rosales's second point of error.

Cash withdrawals

As mentioned above, the district court admitted into evidence bank records showing that Rosales had made a cash withdrawal of $600 on the day of the alleged assault. Rosales does not challenge the admissibility of this evidence. However, the records also showed various other cash withdrawals that Rosales had made during the month of October 2013, and in his third point of error, Rosales asserts that evidence of these other cash withdrawals was irrelevant.

Assuming without deciding that evidence of other cash withdrawals was inadmissible, we cannot conclude on this record that this evidence harmed Rosales. As discussed above, the evidence of guilt can be fairly characterized as overwhelming, and in light of that evidence, it is difficult to see how evidence tending to show that Rosales had withdrawn cash from his bank on

other occasions would make the case for conviction or punishment any more persuasive than it already was. Additionally, the State did not emphasize these other cash withdrawals during its closing argument. Instead, the State focused on the cash withdrawal that was made on the day of the assault that tended to corroborate Y.R.'s testimony. On this record, we have fair assurance that the error, if any, in admitting the evidence of other cash withdrawals did not influence the jury, or had but a slight effect.

We overrule Rosales's third point of error.

Charge error

The Code of Criminal Procedure requires that evidence of extraneous offenses or bad acts committed by the defendant "may not be considered in assessing punishment until the factfinder is satisfied beyond a reasonable doubt that such offenses are attributable to the defendant."[28] The Court of Criminal Appeals has held that the jury must be instructed on this requirement in the court's charge on punishment whenever extraneous-offense evidence is admitted.[29] In his fourth point of error, Rosales asserts that the district court erred in failing to instruct the jury on this requirement. The State concedes error on this point but argues that Rosales was not harmed by the omission of the instruction.

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[28] *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999) (citing Tex. Code Crim. Proc. art. 37.07, § 3(a)).

[29] *See Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000).

Rosales acknowledges that he did not object to the absence of this instruction in the court below. Accordingly, Rosales is entitled to reversal only if the record shows egregious harm.[30] "Egregious harm is harm that deprives a defendant of a 'fair and impartial trial.'"[31] Stated another way, "[j]ury-charge error 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.'"[32] "The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm."[33] It is a "difficult standard and must be proved on a case-by-case basis."[34] "When assessing harm based on the particular facts of the case, we consider (A) the entire jury charge; (B) the state of the evidence[,] including contested issues and the weight of the probative evidence; (C) the parties' arguments; and (D) all other relevant information in the record."[35]

The entirety of the charge

The court's charge contained no instruction informing the jury that it may not consider evidence of extraneous offenses unless it believed beyond a reasonable doubt that Rosales had committed those offenses. Moreover, the court's charge on punishment instructed the jury that

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[30] *See Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015) (citing *Almanza v. State*, 686 S.W.3d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)).

[31] *Id*.

[32] *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007).

[33] *Swearingen v. State*, 270 S.W.3d 804, 813 (Tex. App.—Austin 2008, pet. ref'd) (citing *Almanza*, 686 S.W.2d at 174).

[34] *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002).

[35] *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015).

it "may take into consideration all the evidence admitted before you in the full trial of this case and the law submitted to you by the court." Although the court's charge on guilt / innocence instructed the jury that it was not to find Rosales guilty unless it found beyond a reasonable doubt that he had committed the charged offense, no burden of proof regarding extraneous offenses was specified in the charge on punishment. We conclude that this factor weighs in favor of a finding of egregious harm.

State of the evidence, including contested issues and the weight of the probative evidence

The State presented evidence of several extraneous offenses and bad acts during the punishment phase of trial. Y.R.'s mother testified that in 1996, when she was 17 years old, Rosales took her and his then-14-year-old niece, M.M., to Hippie Hollow, and asked them to take off their clothes. According to Y.R.'s mother, when Rosales took off his clothes in front of them, she noticed that his penis was erect. Y.R.'s mother also testified that, on several occasions, Rosales would walk in on her in the bathroom while she was taking a shower and, on other occasions, touched her legs, hugged her inappropriately, and asked her if she wanted him to teach her "about [her] body" and how to have sex.

M.M., in her testimony, also described the Hippie Hollow incident and corroborated the testimony of Y.R.'s mother. Additionally, M.M. testified that when she was 17 years old, Rosales took her to XTC Cabaret, a strip club in Austin. M.M. further testified that Rosales would walk in on her while she was showering, and, on one occasion when she was giving him a massage (while Rosales was nude), he had asked for details of her sex life with her boyfriend.

Rosales testified in his defense at the hearing on punishment and disputed some but not all of the extraneous-offense evidence. For example, although Rosales denied walking in on the women while they were showering and touching Y.R.'s mother inappropriately, he admitted taking Y.R.'s mother and M.M. to Hippie Hollow and also admitted taking M.M. to XTC Cabaret. However, Rosales claimed that he did not know that Hippie Hollow was a nudist park or that XTC Cabaret was a strip club. Rosales also claimed that he had taken M.M. to XTC so that she could find employment there.

We must also consider the evidence supporting the charged offense.[36] As we have already explained, the State presented overwhelming evidence that Rosales had sexually assaulted his 13-year-old niece. There is no indication in the record that the jury, having already found that the State had satisfied its burden of proof as to the charged offense, would have assessed a lighter sentence if it had been instructed on the burden of proof for extraneous offenses. We conclude that this factor weighs against a finding of egregious harm.

The parties' arguments

In its opening statement, the State focused exclusively on the extraneous offenses. In its closing argument, the State again discussed the extraneous offenses, but it also discussed the evidence pertaining to the circumstances of the charged offense and the impact that the charged offense had on the victim. The defense, in its opening statement, disputed the State's characterization of Rosales as a "creepy monster" but did not dispute the specific details of the

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[36] *See Martinez v. State*, 313 S.W.3d 358, 368 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

extraneous offenses. In its closing argument, the defense did not discuss the extraneous-offense evidence. Because the parties' arguments indicate that the extraneous offenses were not sharply disputed, we conclude that this factor weighs against a finding of egregious harm.

Other relevant information

Rosales received a sentence of 40 years' imprisonment, when the maximum sentence he could have received was life imprisonment. The length of the sentence weighs against a finding of egregious harm.[37] We also observe that the jury was repeatedly informed during voir dire that the State's burden of proof in the case was beyond a reasonable doubt. Although there was no specific instruction applying this burden to extraneous-offense evidence, we conclude that the discussion on the State's burden of proof during voir dire weighs slightly against a finding of egregious harm.

In sum, of the four factors, only the first weighs in favor of a finding of egregious harm. The weight of the probative evidence strongly supported the State's theory that Rosales had sexually assaulted his niece, and the extraneous-offense evidence, although disputed in part by Rosales, was not contested to such an extent that would cause us to conclude that the jury might have disregarded or discounted that evidence and assessed a lesser sentence if it had been properly instructed on the State's burden of proof. Thus, we cannot conclude on this record that Rosales suffered egregious harm from the charge error.[38]

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[37] *See Bolden v. State*, 73 S.W.3d 428, 432 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

[38] *See Graves v. State*, 310 S.W.3d 924, 930-31 (Tex. App.—Beaumont 2010, pet. ref'd) *Martinez*, 313 S.W.3d at 367-70; *Sansom v. State*, 292 S.W.3d 112, 132-33 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Allen v. State*, 47 S.W.3d 47, 51-53 (Tex. App.—Fort Worth 2001, pet. ref'd); *Huizar v. State*, 29 S.W.3d 249, 251 (Tex. App.—San Antonio 2000, pet. ref'd).

We overrule Rosales's fourth point of error.

CONCLUSION

We affirm the judgment of conviction.

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Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: November 10, 2017

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