NUMBERS 13-14-00440-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

VICTOR SANCHEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 214th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes and Longoria
Memorandum Opinion by Justice Perkes

Appellant Victor Sanchez appeals his conviction of two counts of aggravated sexual assault of a child, a first-degree felony.[1] *See* TEX. PENAL CODE ANN. § 22.02

[1] Count 1 alleged that appellant intentionally or knowingly caused the penetration of the female sexual organ of complainant, a female child younger than six years of age by appellant's finger. Count 2 alleged that appellant intentionally or knowingly contacted or penetrated the female sexual organ of complainant, a female child younger than six years of age by appellant's mouth.

(West, Westlaw through 2015 R.S.). A jury found appellant guilty on both counts, and assessed punishment of twenty-five years' imprisonment in Texas Department of Criminal Justice—Institutional Division for count one, and thirty-five years' imprisonment for count two, said sentences to run concurrently. By three issues, which we combine and address as one, appellant argues that the definitions of the terms "penetration" and "sexual organ" in the jury charge were impermissible comments on the weight of the evidence,[2] and that appellant was egregiously harmed by the erroneous jury charges that commented on the weight of the evidence. We affirm.

I. BACKGROUND

Complainant, who was five years old at the time of the alleged assault, testified that Sanchez, an employee of Dollar General, took her into the store's restroom on the pretense of checking to see if she had stolen something. She testified that Sanchez touched her genitals on the skin with his hand, his palm, and his mouth. Complainant further testified that, when Sanchez touched her with his finger, he touched her genitals on the outside and not the inside, and that she could not remember whether he put his mouth on the inside.

[2] The State, citing *Woodard v. State*, 322 S.W.3d 648, 659 (Tex. Crim. App. 2010), argues appellant waived error by affirmatively representing to the trial court that the jury charge was appropriate. We disagree. The *Woodard* Court noted appellant had some responsibility for the jury instruction by helping prepare the jury charge. *Id.* Here, there is no evidence in the record appellant actually helped draft the jury charge, or submitted the jury instruction that he now challenges on appeal. We conclude appellant's affirmation that the jury charge was correct does not amount to responsibility for its creation. *See Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004) (defendant's statement of "no objection" to erroneous jury charge "shall be deemed equivalent to a failure to object" and defendant "may raise such unobjected-to [jury] charge error on appeal, but may not obtain reversal for such error unless it resulted in egregious harm").

Forensic nurse Carol McLaughlin testified that she examined the five-year-old complainant. Complainant reported to her that Sanchez put his finger "in my private over my panties. He was moving it in there, in my private." During her physical examination of the victim, McLaughlin found a one-quarter centimeter area of red bruising noted to the labia minora. McLaughlin explained that the labia minora are the inner lips inside the vagina, and that a person would have to open the labia majora, or outer lips of the vagina, to get to the labia minora. Appellant's DNA was found on complainant's underwear.

II. JURY CHARGE

Appellant complains about the following unobjected-to definitions that were given in the jury charge during the guilt-innocence phase of the trial:

> You are instructed that "penetration" is complete however slight. Penetration and or contact and or touching can occur over the clothing. "Sexual organ" refers to the entire female genitalia, including both the vagina and the vulva. Contact beneath the folds of the external genitalia amounts to penetration.

A. Standard of Review

When an appellate court is presented with an argument that a trial court committed jury charge error, the reviewing court must conduct a two-step inquiry: "First, the reviewing court must determine whether the jury charge contains error. Second, the court must determine whether sufficient harm resulted from the error to require reversal." *Mann v. State*, 964 S.W.2d 639, 641 (Tex. Crim. App. 1998) (en banc); *see Benn v. State*, 110 S.W.3d 645, 648 (Tex. App.—Corpus Christi 2003, no pet.). "Where the error is urged for the first time on appeal, a reviewing court will search for 'egregious harm.'"

Mann, 964 S.W.2d at 641 (quoting *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994) (en banc)). Jury-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. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008) (citing *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2007)). In sum, the error must have been so harmful as to effectively deny the accused a fair and impartial trial. *See Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008). Egregious harm from an unobjected-to error in the jury charge is a difficult standard to prove, and such a determination must be done on a case-by-case basis. *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

In determining whether appellant was deprived of a fair and impartial trial, we review "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 record of the trial as a whole." *Id.* (quoting *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc)). We will examine "any . . . part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused." *Id*. at 490 (quoting *Almanza,* 686 S.W.2d at 174).

B. Applicable Law

The Code of Criminal Procedure requires that instructions to the jury be limited to setting forth the law applicable to the case and that they not express any opinion as to the weight of the evidence. *Green v. Texas*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015) (citing TEX. CODE CRIM. PROC. ANN. art. 36.14 (West, Westlaw through 2015 R.S.)).

Under article 36.14, the trial court is required to give the jury a written charge "setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in [its] charge calculated to arouse the sympathy or excite the passions of the jury." *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14). Definitions for terms that are not statutorily defined are not considered to be "applicable law" under article 36.14, and it is generally impermissible for the trial court to define such terms in the jury instructions. *Id.*

C. Analysis

The Court of Criminal Appeals has addressed the identical argument that is currently before us. In *Green*, the jury charge included definitions of "penetration" and "female sexual organ." *Id.* The *Green* court determined that the jury should have been free to assign those terms any meaning that is acceptable in common parlance, and further held that no persuasive authority established technical or particular legal meanings for those terms. *Id.* at 445. Consequently, the court held that the jury charge was erroneous. *Id.* Given the similarity between *Green* and appellant's case, we conclude that the trial court's jury instructions were erroneous. *Id.* at 445–46; *see Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012).

Having found error in the jury charge, we must determine whether appellant suffered egregious harm.[3] *See Mann,* 964 S.W.2d at 641.

[3] In *Green*, the Court of Criminal Appeals "agreed with the court of appeals that the 'some harm' standard is appropriate in light of the fact that appellant preserved his charge-error complaint. *Green v. Texas,* 476 S.W.3d 440, 446 (Tex. Crim. App. 2015); *Almanza v. State*, 686 S.W.2d 157, 170 (Tex. Crim. App. 1985). The Court concluded that "[a]lthough it was error to define the words 'female sexual organ' and 'penetration,' the definitions did not cause harm to appellant."

1. Jury Charge as a Whole

In considering the jury charge as a whole, we conclude that this factor weighs against a finding of egregious harm. Appellant concedes the application paragraph of the charge correctly instructed the jury on the relevant law. Further, and although the definitions of "penetration" and "sexual organ" were extraneous, they accurately described the common meanings of the terms. In *Green*, the trial court's instructions on "penetration" and "female sexual organ were stated, as follows:

> You are instructed that penetration occurs so long as contact with the female sexual organ could reasonably be regarded by ordinary English speakers as more intrusive than contact with the outer vaginal lips and is complete, however slight, if any. Touching beneath the fold of the external genitalia amounts to penetration within the meaning of the aggravated sexual assault statute.
>
> . . . .
>
> The term "female sexual organ" means the entire female genitalia, including both vagina and the vulva. Vulva is defined as the external parts of the female sexual organs, including the labia majora, the labia minora, mons veneris, clitoris, perineum, and the vestibule or entrance to the vagina.

Green, 476 S.W.3d at 445–46. The trial court's instructions were consistent with the instructions given in *Green*. *See id.*; *see also Vernon v. State*, 841 S.W.2d 407, 409–10 (Tex. Crim. App. 1992) ("penetrate may mean to enter into or to pass through"). As such, the instructions are mild, neutral, and describe "an obvious common-sense proposition," and thus they would not have impinged on the jury's fact-finding authority. *See Green*, 476 S.W.3d at 447 (quoting *Brown v. State*, 122 S.W.3d 794, 803 (Tex. Crim. App. 2003)). The charge as a whole does not support a finding of egregious harm.

2. Arguments of Counsel

We conclude that the arguments of counsel fail to show that appellant's defense was egregiously affected by the inclusion of the definitions. Appellant's defensive theory focused on undermining complainant's credibility by showing that appellant never had any sexual contact with complainant. In closing argument, appellant identified several witnesses' testimony in an attempt to show a lack of corroborating eyewitnesses to the alleged assault, as well as some inconsistencies in complainant's testimony. He further highlighted an alleged financial interest that complainant's mother had in the event of a successful prosecution.

The State's closing, in contrast, focused on complainant's testimony and the incredibility that she could have made up such a story. The State examined the timeline of events and the opportunity that appellant had to be alone with complainant. While the State discussed the definition of "penetration" and alluded to the definition of "female sexual organ," its explanation was consistent with the common parlance of those terms. This factor weighs against a determination of egregious harm. *See Taylor,* 332 S.W.3d at 492.

3. Entirety of the Evidence

Examining the entirety of the record, we conclude that this factor also weighs against a finding of egregious harm. Appellant's case focused primarily on highlighting inconsistent testimony from the State's witnesses. Appellant also presented contradictory testimony that the alleged assault never occurred, but rather was part of a larger scheme by complainant and her family to bring a civil lawsuit against appellant and the store where he worked.

The State's case, on the other hand, concentrated on the facts of offense, particularly on appellant's opportunity to be alone with complainant. Complainant's testimony and the forensic testimony regarding the bruise in her vagina, and appellant's DNA in complainant's underwear sufficiently supports the verdict. The state of the evidence does not support a finding of egregious harm. *See id*.

4. Other Factors

Appellant identifies various jury questions that were sent during the course of deliberations that he believes supports a determination of egregious harm. Specifically, he argues that "[t]he improper comments are especially damaging because they could have likely tipped the scales in the State's favor and rescued a guilty verdict from [complainant's] equivocal testimony." Appellant references the following:

Juror Note 1: Transcript of Carol McLauglin [sic]

Court Response: All the evidence admitted is before you, unless you have a specific question about a specific point.

Juror Note 6: We would like [the complainant's] testimony please!!! Or did [the complainant] testify that defendant put his mouth on her genitals?

Court Response: Please list if there is a specific dispute and what the dispute is!

Juror Note 7: We are having a dispute about [the complainant's] testamant [sic] on the stand. We need her testimony!!

Court Response: There must be a specific question of the testimony that is in dispute.

Juror Note 11: What happens if they [sic] jury is locked on both counts?

Court Response: Continue to deliberate.

The notes, alone, do not inquire about the extent of the touching or penetration. Rather, the notes show that the jury wanted to review complainant's testimony and that they may have been discussing whether and how appellant touched complainant's sexual organs. In fact, Jury Note 9 asked "[w]hat did [the complainant] say in her testimony to indicate that the defendant used his mouth?" The trial court responded "Direct and Cross Examination are being provided." The testimony provided, as follows:

[STATE]: Okay. Now, he touched you with his hand and his palm. Did he touch you—your weiner[4] with anything else?

[COMPLAINANT]: Mouth.

[STATE]: With his mouth?

[COMPLAINANT]: (Shaking head)

[STATE:] Okay. Did he put his mouth on any other part of you besides his (sic) weiner?

[COMPLAINANT]: No.

. . .

[STATE]: Okay. What about when he touched your mouth—I'm sorry—when he touched your weiner with his mouth. Did he put his mouth on the inside of your private?

[COMPLAINANT]: Don't remember.

After reviewing the jury notes, in the context of the complete record and jury deliberations, we hold that they do not they support a finding of egregious harm.

5. Summary

[4] The complainant referred to her female genitalia as her "weiner."

In viewing this case as a whole, we cannot conclude that the erroneous jury charge definitions caused appellant egregious harm, in the sense that appellant was deprived of a fair and impartial trial. *See Taylor,* 332 S.W.3d at 493; *see also Sosa v. State*, No. 13–12–00764–CR, 2015 WL 7352310, at *6 (Tex. App.—Corpus Christi Nov. 19, 2015, no pet.) (mem. op., not designated for publication). We overrule appellant's issue.

III. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES

Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
23rd day of June, 2016.