NUMBER 13-16-00031-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

TIM DORAN, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 19th District Court of McLennan County, Texas.

Memorandum Opinion[1]

Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

A jury convicted appellant Tim Doran of continuous sexual abuse of a young child,

[1] This appeal was transferred to this Court from the Tenth Court of Appeals by order of the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 22.220(a) (West, Westlaw through Ch. 49 2017 R.S.) (delineating the jurisdiction of appellate courts); *id.* at §73.001 (West, Westlaw through Ch. 49 2017 R.S.) (granting the supreme court the authority to transfer cases from one court of appeals to another at any time when there is "good cause" for the transfer).

see TEX. PENAL CODE ANN. § 21.02 (West, Westlaw through Ch. 49 2017 R.S.), a felony of the first degree, *id*. § 21.02(h), and assessed punishment at forty years' confinement. The trial court signed a judgment of conviction and sentence in accordance with the jury's verdict. In one issue, appellant contends that the trial court reversibly erred by preventing him from "conducting voir dire on the full range of punishment including probation." We affirm.

I. BACKGROUND[2]

Appellant was charged by indictment with the offense of continuous sexual abuse of a child younger than fourteen years old. *See* TEX. PENAL CODE ANN. § 21.02. The indictment was not amended and no additional charges were brought against appellant.

Shortly before voir dire examination, the trial court and the parties discussed the parameters of examining the venire panel on the possibility of probation,

COURT:	Let's get on the record for a moment on the Tim Doran case and make sure we're all on the same page. This is one count of Continuous Sexual Abuse of a Child, alleged. Minimum of 25 to life, right, and a fine up to $20,000? Is that right?
PROSECUTOR 1:	Is there a fine? I can't remember.
PROSECUTOR 2:	No, there is no fine.
COURT:	There is no fine. Okay. But he can't get probation. Right?
PROSECUTOR 2:	No probation and no parole.
COURT:	And what?

[2] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

PROSECUTOR 2: No parole. Anything we need to take up before we bring the jury panel in?

PROSECUTOR 1: Your Honor, [Appellant's counsel] filed an application for probation, but even if he were to be found guilty of the lesser included, he's not eligible for probation based on the victim's age. She was six and seven at the time.

COURT: When did you file it? I don't have it on my docket sheet.

APPELLANT: I filed it today, Your Honor. I filed it just in case. There is no telling what may happen.

COURT: Well, we're not going to voir dire on probation. If it somehow comes up he's convicted of something that makes him probation eligible, then we'll put that in the charge, but we're not going to talk about probation to the jury, unless you can tell me some reason why it's going to be relevant.

APPELLANT: We have to listen to all of the testimony first, Your Honor.

Before the parties conducted voir dire, the trial court addressed the venire panel. Among the trial court's remarks, it noted that "in this particular category of offense, of crime, a defendant is not eligible to be considered for probation or for parole." Neither the State nor appellant mentioned the possibility of probation during their voir dire examinations.

During the charge conference, the parties and the trial court agreed on instructing the jury on indecency with a child by contact as a lesser-included offense of continuous sexual assault of a child. They then discussed,

APPELLANT: I can't think of any other lesser included that would apply.

PROSECUTOR 1: Class C assault.

APPELLANT: Okay. So, Your Honor—

COURT: What?

APPELLANT: —would you consider Class C assault as a lesser included also?

COURT: I'll think about it. What evidence raised that? There has to be something that raised a Class A assault.

APPELLANT: Touching. Any touching raises a Class—I thought I said "C."

PROSECUTOR 2: He did. He said Class C assault, Your Honor, which would just be the offense of touching, that the child was offended by the touching of her leg.

COURT: What's the evidence that she was—

PROSECUTOR 2: If the child was offended by the touching of the leg, I guess, would be the assault.

COURT: But there wasn't any evidence.

PROSECUTOR 1: There was no evidence she was offended.

COURT: What?

PROSECUTOR 1: There was no evidence she was offended. That wasn't raised.

COURT: There wasn't any evidence to raise that at all from any source.

APPELLANT: Well, Your Honor, I remember her saying that she had said, no, she didn't like it. That's offensive.

COURT: Good Lord.

APPELLANT: And she testified that he didn't like him touching her.

COURT: If they believe that part of it, they are going to believe

he's guilty of what he's charged with.

The trial court ultimately instructed the jury on the two aforementioned offenses and assault as a "lesser-included offense." The jury found appellant guilty of continuous sexual abuse of a young child.

The punishment jury charge allowed the jury to assess punishment at confinement for life or a range between twenty-five to ninety-nine years of confinement. The jury answered forty years. The trial court signed a judgment of conviction and sentence in accordance with the jury's verdict. This appeal followed.

II. DISCUSSION

Appellant argues that "[i]t was of paramount importance for [a]ppellant to carefully exercise his peremptory challenges and challenges for cause against any juror who could not or would not consider the full range of punishment in this case." He suggests that the trial court's erroneous ruling resulted in harmful error. *See* TEX. R. APP. P. 44.2(a).

The State responds that the trial court did not abuse its discretion in limiting voir dire. It contends that probation was not a possible sentence on the ground that assault was not a proper lesser-included offense of the charged offense—continuous sexual assault of a child—and that the trial court erroneously instructed the jury on assault. The State further argues that if error occurred, it should be held harmless under the harmless error rule. *See* TEX. R. APP. P. 44.2(b).

A. Standard of Review

We review the trial court's determination concerning the propriety of a voir dire question for abuse of discretion. *See Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim.

App. 2002). The trial court abuses its discretion only when a proper question concerning a proper area of inquiry is prohibited. *See Dinkins v. State*, 894 S.W.2d 330, 345 (Tex. Crim. App. 1995).

B. Applicable Law

This case deals with the intersection of a trial court's discretion regarding the propriety of a voir dire question and whether assault is a lesser-included offense of indecency with a child by contact.

The voir dire process allows counsel to determine if any venire panelist is biased for or against one of the parties or the relevant law and facilitates the intelligent use of peremptory strikes. *See Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005). Therefore, the scope of a permissible voir dire examination is necessarily broad to enable counsel to discover any potential bias or prejudice. *Id*. At the same time, the trial court is given broad discretion to control the voir dire examination of the venire and may impose reasonable restrictions on the questions asked and the length of the voir dire examination. *Ratliff v. State*, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985). "These two principles—the right of counsel to question venire members and the right of the trial court to control voir dire and impose reasonable restrictions—co-exist and must be harmonized." *Id*. Bias against the range of punishment is a proper area of inquiry during voir dire for both challenges for cause and peremptory strikes. *See Standefer v. State*, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001) ("[A] prospective juror must be able to consider the full range of punishment provided for an offense or be challengeable for cause.").

The Tenth Court of Appeals has held that the proof required to establish assault

by offensive or provocative contact is different, not less, than that required to prove indecency with a child by contact. *Shea v. State*, 167 S.W.3d 98, 106 (Tex. App.—Waco 2005, pet. ref'd).[3] Thus, a charge of misdemeanor assault by offensive or provocative contact is not a lesser-included offense of a charge of indecency with a child by contact. *Id*.; *Ramos v. State*, 981 S.W.2d 700, 701 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (holding that assault by contact is not a lesser-included offense of aggravated sexual assault or indecency with a child); *see also Burgess v. State*, No. 02-12-00407-CR, 2014 WL 70090, at *4 (Tex. App.—Fort Worth Jan. 9, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that assault by contact is not a lesser-included offense of continuous sexual assault of young children, aggravated sexual assault, or indecency with a child); *Silber v. State*, No. 13-05-00238-CR, 2006 WL 347167, at *2–3 (Tex. App.—Corpus Christi Feb.16, 2006, pet. ref'd) (mem. op., not designated for publication) (holding that assault by contact is not a lesser-included offense of indecency with a child).

C. Analysis

At the time the trial court prohibited appellant from questioning the venire members regarding whether each could consider community supervision as a possible punishment, the only offense appellant stood indicted for was continuous sexual abuse of a young child. *See* TEX. PENAL CODE ANN. § 21.02. The trial court may have concluded that,

[3] This case must be decided in accordance with the precedent of the Tenth Court of Appeals. *See* TEX. R. APP. P. 41.3 ("In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court.").

even if appellant was entitled to an instruction regarding indecency with a child by contact, under *Shea*, 167 S.W.3d at 106, appellant would not have been entitled to an instruction regarding assault by offensive or provocative contact as a lesser-included offense of a charge of indecency with a child by contact. Even if appellant was convicted of indecency with a child by contact, community supervision could not be assessed as a punishment. TEX. CODE CRIM. PROC. ANN. art. 42.12, §3g(a)(1)(C) (West, Westlaw through 2017 R.S.). Accordingly, we find no abuse of discretion from the trial court prohibiting appellant from questioning the venire panel regarding the possibility of community supervision. *Cf. Standefer*, 59 S.W.3d at 181 (providing that a prospective juror must be able to consider the full range of punishment provided for an offense or be challengeable for cause); *see also Ratliff*, 690 S.W.2d at 599 (noting that the trial court is given broad discretion to control the voir dire examination of the venire and may impose reasonable restrictions on the questions asked and the length of the voir dire examination).

Appellant's sole issue is overruled.

III. CONCLUSION

The judgment of conviction and sentence of the trial court is affirmed.

LETICIA HINOJOSA
Justice

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

Delivered and filed the
13th day of July, 2017.