NUMBERS 13-22-00160-CR, 13-22-00161-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JUAN PABLO RESENDIZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 77th District Court
of Limestone County, Texas.

MEMORANDUM OPINION

Before Justices Tijerina, Silva, and Peña
Memorandum Opinion by Justice Peña

Appellant Juan Pablo Resendiz appeals his convictions for sexual assault of a child and assault family violence with a previous assault family violence conviction, a second-

degree and a third-degree felony.[1] *See* TEX. PENAL CODE ANN. §§ 22.01(b)(2)(A), 22.011(a)(2). After a consolidated trial, a jury found Resendiz guilty of both offenses, and the trial court assessed respective concurrent sentences of sixteen and ten years' imprisonment. In one issue, Resendiz argues that he suffered egregious harm from the trial court's erroneous jury charge. We affirm.[2]

I. JURY CHARGE ERROR

Resendiz complains that the trial court's instructions on how the jury is to consider extraneous offense evidence were erroneous when "[v]iewed as a whole" because the instructions "act at cross purposes [and are] impossible for a layperson to understand[.]" Resendiz further argues that the trial court should have included an instruction "to have the jury consider the evidence of both [charged offenses] separately." Resendiz maintains that he was egregiously harmed by the charge error because the instructions allowed the jury to "potentially convict[] [Resendiz] as a criminal in general."

A. Pertinent Facts

A grand jury returned an indictment charging Resendiz with intentionally or knowingly causing the mouth of A.R.,[3] a child under the age of seventeen, to contact or

[1] In appellate cause number 13-22-00160-CR, Resendiz appeals his conviction for assault family violence. *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(A). In appellate cause number 13-22-00161-CR, Resendiz appeals his conviction for sexual assault of a child. *See id.* § 22.011(a)(2). For the sake of judicial efficiency, we address both appellate causes in this consolidated memorandum opinion.

[2] This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[3] We refer to the minor complainant by her initials to protect her privacy. *See* TEX. R. APP. P. 9.8 cmt. ("The rule [protecting the privacy for filed documents in civil cases] does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases."); *Salazar v. State*, 562 S.W.3d 61, 63 n.1 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.).

be penetrated by the sexual organ of Resendiz. Under a separate indictment, the grand jury charged Resendiz with intentionally, knowingly, or recklessly, causing bodily injury to A.R., a family member, while having a prior assault family violence conviction. The two offenses were tried together by agreement.[4]

At trial, the State presented evidence that Resendiz had previously been convicted of assault family violence against A.R.'s mother. The State also introduced evidence of Resendiz's illicit drug use. Resendiz did not request a contemporaneous limiting instruction to the jury upon the admission of this extraneous offense evidence. Neither did Resendiz request a limiting instruction to be included in the jury charge for each offense. Nevertheless, the trial court *sua sponte* included three limiting instructions in each charge.

In the sexual assault of a child case, the first limiting instruction read:

> You are instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the state of mind of the defendant and the previous and subsequent relationship between the defendant and the child, if any, in connection with the offenses, if any, alleged against him in the indictment in this case, and for no other purpose.

In the assault family violence case, the first limiting instruction read:

> You are instructed that certain evidence was admitted in evidence before you in regard to the defendant's having been charged and convicted of an offense other than the one for which he is now on trial. Such evidence

[4] Multiple pending indictments against a single defendant may be consolidated in a single trial with the consent of the defendant. *See Garza v. State*, 687 S.W.2d 325, 330 (Tex. Crim. App. 1985); *see also Rosalez v. State*, No. 13-21-00164-CR, 2022 WL 3654753, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, pet. ref'd) (mem. op., not designated for publication).

> cannot be considered by you against the defendant as any evidence of guilt in this case except that same may be considered in connection with any prior conviction alleged in the indictment.

The second and third limiting instructions were identical in each charge:

> You are instructed in this case that certain evidence was admitted before you in regard to the defendant having been convicted of offenses other than the one for which he is now on trial. Further, certain evidence was admitted before you in regard to the defendant having committed certain uncharged offenses other than the one for which he is now on trial. You are instructed that such evidence cannot be considered against the defendant as any evidence of his guilt or innocence in this cause.
>
> You are also instructed that you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any, and then you can only consider the same in determining the state of mind of the Defendant, the previous and subsequent relationship between the Defendant and the child, if any, and for the following purposes: determining motive, preparation, plan, intent, knowledge, or absence of mistake or accident, and for no other purposes.

Resendiz did not object to the inclusion or wording of these instructions.

B. Standard of Review & Applicable Law

We review alleged jury charge error by considering two questions: (1) whether error existed in the charge; and (2) whether sufficient harm resulted from the error to compel reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). When, as in this case, a defendant does not object to the charge, we review the record for egregious harm. *Alcoser v. State*, 663 S.W.3d 160, 165 (Tex. Crim. App. 2022) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g)). Under this standard, "the error does not result in reversal 'unless it was so egregious and created such harm that appellant was denied a fair trial.'" *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App.

2008) (quoting *Almanza*, 686 S.W.2d at 171). "Errors that result in egregious harm are those that affect the 'very basis of the case,' 'deprive the defendant of a valuable right,' or 'vitally affect a defensive theory.'" *Id.* at 461–62 (quoting *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)).

"An extraneous offense is 'any act of misconduct, whether resulting in prosecution or not, which is not shown in the charging instrument and which was shown to have been committed by the accused.'" *See Martinez v. State*, 190 S.W.3d 254, 262 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (quoting *Worley v. State*, 870 S.W.2d 620, 622 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)). Texas Rule of Evidence 404(b) prohibits the admission of extraneous offense evidence solely "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). Such evidence may be admissible, however, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" or to rebut defensive theories. *Id.* R. 404(b)(2). Furthermore, in prosecutions for certain crimes against children, including the offenses charged here, article 38.37 of the code of criminal procedure requires the admission of extraneous offenses committed by the defendant against the child complainant "for its bearing on relevant matters, including . . . the state of mind of the defendant and the child; and the previous and subsequent relationship between the defendant and the child." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1(b). A prior conviction for assault family violence is an essential element of felony assault family violence. *Davis v. State*, 533 S.W.3d 498, 512–13 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). When extraneous-offense evidence is

offered to prove an element of an offense, no limiting instruction is required. *McGowan v. State*, 375 S.W.3d 585, 593 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing *Porter v. State*, 709 S.W.2d 213, 215 (Tex. Crim. App. 1986)). However, when a defendant stipulates to a prior conviction as a jurisdictional element of the offense, the trial court may instruct the jury that the "prior convictions may not be used for any other purpose in determining the guilt of the defendant on the charged occasion." *Martin v. State*, 200 S.W.3d 635, 639 (Tex. Crim. App. 2006).

Under Texas Rule of Evidence 105(a), when a trial court admits extraneous offense evidence for a limited purpose, upon request by a party, the trial court "must restrict the evidence to its proper scope and instruct the jury accordingly." TEX. R. EVID. 105(a). If a defendant requests a limiting instruction at the time evidence of extraneous offenses is first admitted at trial and a corresponding limiting instruction in the jury charge, the trial court must include a limiting instruction in the charge. *See Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.14 (requiring the trial court to present the jury with "a written charge distinctly setting forth the law applicable to the case"). If, however, the defendant fails to request a limiting instruction when the evidence is first admitted, it is admissible for all purposes, and the trial court is not obligated to include a limiting instruction in the jury charge. *See Delgado*, 235 S.W.3d at 251, 254; *see also Hammock v. State*, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001) ("Because the evidence in question was admitted for all purposes, a limiting instruction on the evidence [regarding extraneous offenses] was not 'within the law applicable to the case,' and the trial court was not required to include a limiting instruction

in the charge to the jury.").

C. Analysis

We first address whether the trial court's limiting instructions were erroneous. We note that Resendiz did not request any limiting instruction when the extraneous offense evidence was admitted. Therefore, the evidence was admitted for all purposes for each charged offense, and no limiting instruction was required. *See Delgado*, 235 S.W.3d at 254; *Hammock*, 46 S.W.3d at 895. We further observe that the limiting instructions the trial court provided *sua sponte* were proper recitations of the rules of evidence, the code of criminal procedure, and judicial precedent as set out above. Assuming arguendo that the limiting instructions were confusing or imprecise when read together, the instructions could not have been erroneous because the jury was permitted to consider the evidence for all purposes. *See Delgado*, 235 S.W.3d at 249. In other words, the limiting instructions were merely superfluous. *See Plata v. State*, 926 S.W.2d 300, 302–03 (Tex. Crim. App. 1996) ("The inclusion of a merely superfluous abstraction, therefore, never produces reversible error in the court's charge because it has no effect on the jury's ability fairly and accurately to implement the commands of the application paragraph or paragraphs.") *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997); *see also Garza v. State*, No. 03-22-00073-CR, 2023 WL 4277362, at *18 (Tex. App.—Austin June 30, 2023, no pet. h.) (mem. op., not designated for publication) (concluding that there was no jury charge error for the trial court's inclusion of an overly broad limiting instruction where the extraneous offense evidence was admitted for all purposes); *Harris v. State*, No. 10-19-00432-CR, 2020 WL 7867138, at *4 (Tex. App.—Waco Dec. 30, 2020,

pet. ref'd) (mem. op., not designated for publication) (same); *Micael v. State*, No. 13-17-00033-CR, 2018 WL 4100806, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 29, 2018, pet. ref'd) (mem. op., not designated for publication) (concluding that there was no charge error for the absence of a limiting instruction where appellant failed to request a limiting instruction at the time that the extraneous offense evidence was admitted). Further, Resendiz cites no authority, nor can we find any, requiring the trial court to *sua sponte* include an instruction "to have the jury consider the evidence of both [charged offenses] separately."[5] *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *see also Martinez v. State*, No. 14-01-00674-CR, 2002 WL 1354238, at *3 n.2 (Tex. App.—Houston [14th Dist.] June 20, 2002, no pet.) (mem. op., not designated for publication) (noting that the court could find no cases requiring a limiting instruction when offenses are tried jointly and concluding that trial counsel was not ineffective for failing to request such an instruction).

For similar reasons, Resendiz cannot show he was egregiously harmed by the alleged charge error. *See Warner*, 245 S.W.3d at 461. Again, the jury was permitted to consider extraneous offense evidence for all purposes. Therefore, any instruction that served to limit the jury's consideration of the evidence could have only benefited Resendiz. *See Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013) ("[Egregious harm] is a difficult standard to meet and requires a showing that the defendants were

[5] Resendiz cites federal case law indicating that such an instruction has been given in federal criminal trials, but he cites no authority stating that it is error when a trial court does not *sua sponte* include such an instruction.

deprived of a fair and impartial trial."); *see also Garza*, 2023 WL 4277362, at *18 (holding that appellant could not show he was egregiously harmed by an overly expansive limiting instruction because the evidence was admitted for all purposes). Because Resendiz can neither show error in the jury charges nor egregious harm, we overrule Resendiz's sole issue in each appellate cause number.

II. CONCLUSION

We affirm the trial court's judgments.

L. ARON PEÑA JR.
Justice

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

Delivered and filed on the
31st day of August, 2023.