

NO. 12-15-00211-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***DERRELL HAMPTON,
APPELLANT***

§ ***APPEAL FROM THE 241ST***

V.

§ ***JUDICIAL DISTRICT COURT***

***THE STATE OF TEXAS,
APPELLEE***

§ ***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

A jury found Appellant, Derrell Hampton, guilty of the offense of engaging in organized criminal activity. The jury found Appellant previously had been convicted of a felony and assessed his punishment at imprisonment for life with no fine. In two issues, Appellant complains (1) that the jury charge on guilt failed to include the necessary *mens rea* of the charged offense, and (2) that the trial court erred in excluding impeachment evidence. We affirm.

BACKGROUND

On December 19, 2012, Elizette Gregorio, her brother, Orlando Gregorio, and Orlando's girlfriend went to a Tyler city park to play basketball. Appellant and two other members of the Insane Crips gang approached them. One of the Insane Crips fired a shot in the air. The men ordered Elizette and the others to lay on the ground while one of them searched through their pockets taking their jewelry, money, and cell phones. Orlando was ordered to remove his clothes, and he did as he was told. Next, they told Elizette to do the same. Orlando heard Appellant tell the others that "I got to kill somebody tonight, and it has to be a girl." After Elizette initially refused to remove her clothes, Appellant put his gun to her forehead. Orlando jumped on Appellant and struggled with him over control of the weapon. During the struggle,

Orlando was shot in the neck. After the shot, the three assailants fled. Orlando remains permanently paralyzed from the shoulders down.

Chester Vaughn, one of Appellant's co-defendants, testified that all three of the men who participated in the attack are members of the Insane Crips gang. He identified Appellant as the gang member holding the gun, directing the others, and the person who shot Orlando Gregorio. He told the jury that while Appellant held the gun on the victims, the other two gang members rummaged through the victim's pockets looking for anything worth stealing. The DNA of each of the three gang members was found in the pockets of Orlando's shorts. A gang expert testified that Appellant and his confederates belonged to the Insane Crips gang based, in part, on their gang-related tattoos and photographs of them wearing gang colors. The jury also heard evidence that the Insane Crips are a "criminal street gang" as defined in the penal code and that such gangs routinely engage in a wide variety of crimes.

CHARGE ERROR

In his first issue, Appellant contends that he was egregiously harmed by the failure of the jury charge on guilt to include the necessary *mens rea* of the charged offense.

Standard of Review and Applicable Law

In criminal jury trials, the trial court must deliver "a written charge distinctly setting forth the law applicable to the case" TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). It must set out all essential elements of the offense. *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995). A jury charge that tracks the language of a particular statute is a proper charge on the statutory issue. *Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994).

The standard of review for errors in the jury charge depends upon whether the error was preserved. Error preserved by objection requires reversal if there is *some* harm, but if not preserved, egregious harm is required. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). In examining the record for egregious harm, a reviewing court should consider (1) the entire jury charge, (2) the state of the evidence, including the contested issues and the weight of the probative evidence, (3) the final arguments of the parties, and (4) any other relevant information revealed by the record of the trial as a whole. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). 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. *Id.* The

record must demonstrate that the appellant has suffered *actual*, not just theoretical, harm from the erroneous jury instruction. *Id.* at 268.

The Jury Charge

Appellant was charged with the offense of engaging in organized criminal activity in violation of Section 71.02 of the Texas Penal Code. Under the relevant portion of that statute, a person commits an offense

if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit one or more of the following:

- (1) . . . aggravated robbery

TEX. PENAL CODE ANN. § 71.02(a)(1) (West Supp. 2015). “Criminal street gang” is defined as “three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities. TEX. PENAL CODE ANN. § 71.01(d) (West 2011).

The charge submitted contained the following instructions relevant to Appellant’s contentions.

Our law provides that a person commits an offense if as a member of a criminal street gang, a person commits or conspires to commit the offense of Aggravated Robbery.

. . . .

The term “criminal street gang” means three (3) or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

. . . .

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to the circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The Arguments

Appellant argues that Section 71.02(a)(1) requires the jury to find that he committed the criminal act *with the intent to participate in the commission of the act* as a member of a criminal street gang. See TEX. PENAL CODE ANN. § 71.02(a)(1). He insists that a correct charge must include an instruction that the State is required to “prove that [a defendant] had the culpable mental state of intent to participate as a member of a criminal street gang.” See *Curiel v. State*, 243 S.W.3d 10, 19 n.7 (Tex. App.—Houston [1st Dist.] 2007, pet. ref’d). He asserts that the trial court erred in submitting a jury charge that failed to track the language of the statute.

The State responds that Section 71.02 provides for two ways of committing the offense of engaging in organized criminal activity: (1) acting with the intent to establish, maintain, or participate in a combination or in the profits of a combination, or (2) acting as a member of a criminal street gang. The State argues that the intent to “establish, maintain, or participate” as a member of a criminal street gang is implicit in the statutory definition of “criminal street gang”—a definition included in the jury charge. The indictment in this case alleged that Appellant acted as a member of a “criminal street gang,” and not in a “combination.” Therefore, the State contends that Appellant was not entitled to have the jury charged on the intent to “establish, maintain, or participate in” as would have been required if he had been charged as acting as part of a combination or to share its profits.

Discussion

In *Licerio v. State*, this Court considered and rejected the identical arguments advanced by the State in this case. *Licerio v. State*, No. 12-11-00326-CR, 2013 WL 414239, at *6 (Tex. App.—Tyler Jan. 31, 2013, pet. ref’d) (mem. op., not designated for publication). We interpreted “as a member of a criminal street gang” to mean “in the role, capacity or function” of a member of a criminal street gang,” not merely “while” a member. We held that under Section 71.02(a), a finding of guilty required the State to establish that the defendant committed one or more of certain enumerated offenses with the intent to establish, maintain, or participate

- (1) in a combination; or
- (2) in the profits of a combination; or
- (3) in the role, capacity, or function of a member of a criminal street gang.

Id. We found the charge erroneous, because it did not require the jury to find that the appellant committed the underlying crime with the intent to “establish, maintain, or participate in the role, capacity, or function of a member of a criminal street gang.” *Id.* at *5-6.

The Waco court of appeals had previously addressed the same issue in *Samaripas v. State*, No. 10-09-00044-CR, 2010 WL 376949, at *4 (Tex. App.—Waco Feb. 3, 2010, pet. ref’d) (mem. op., not designated for publication). In that case, the trial court instructed the jury that “[a] person commits the offense of engaging in organized criminal activity if, as a member of a criminal street gang, he commits the offense of deadly conduct.” *Id.* at *5. The Waco court held that the charge omitted an essential element of the offense in that it did not require the jury to find that the offense of deadly conduct was committed with the intent to establish, maintain, or participate in the offense as a member of a criminal street gang. *Id.* at *6.

In *Curiel v. State*, as in this case, both the indictment and the jury charge omitted the requisite mental state, requiring only that the appellant commit the underlying offense “as a member of a criminal street gang.” *Curiel*, 243 S.W.3d at 16. However, in assaying the sufficiency of the evidence, the court found that a hypothetically correct jury charge required that the evidence be sufficient to prove that the appellant committed the underlying offense “with the intent to . . . participate . . . as a member of a criminal street gang.” *Id.* The court noted “that the trial court’s charge . . . erroneously failed to require that appellant had the culpable mental state of intent to participate as a member of a criminal street gang.” *Id.* at 19 n.7. However, the appellant did not challenge that error on appeal, and the appellate court did not address whether the appellant was harmed by the error. *Id.*

In *Jackson v. State*, 314 S.W.3d 118, 124-25 (Tex. App.—Houston [1st Dist.] 2010, no pet.), the court confirmed that “the State had the burden to prove beyond a reasonable doubt that appellant committed the underlying offense of aggravated robbery or robbery with the intent to establish, maintain, or participate as a member of a criminal street gang.” *Id.* at 124-25. “The core component of the second element is appellant’s intent to act as a member of a criminal street gang.” *Id.* at 127.

These cases establish that the *intent to participate* in the commission of the underlying crime as a member of a criminal street gang is an essential element of the offense. A proper charge must contain this requisite intent element and cannot permit a finding of guilt upon a showing of nothing more than that the defendant committed the underlying offense “as a member

of a criminal street gang.” A correct jury charge must instruct the jury that “a person commits the offense of engaging in organized criminal activity if, with intent to participate as a member of a criminal street gang.” The trial court erred in submitting a charge that did not require the jury to find the essential element of intent.

Harm

Appellant did not object to the jury charge at trial. Unpreserved charge error will not result in reversal in the absence of egregious harm. *Almanza*, 686 S.W.2d at 171. The degree of harm must be assessed considering (1) the entire jury charge, (2) the state of the evidence, (3) the argument of counsel, and (4) other relevant information revealed by the record. *Id.*

The jury charge provided the jury with the statutory definition of “criminal street gang.” The charge also defined “intentionally” and “knowingly” and required a finding of these culpable mental states for the underlying offense. The application paragraph cannot be read as requiring the jury to find that Appellant committed the underlying offense with the “intent to participate in” the offense as a member of a criminal street gang.

The evidence against Appellant was overwhelming and uncontradicted. Appellant led his gang members in the robbery of a family group. He ordered thirteen year old Elizette to remove her clothes. Orlando heard Appellant tell the others that “I got to kill somebody tonight and it has to be a girl.” When Elizette hesitated to undress as Appellant had ordered, Appellant put a gun to her forehead. Her older brother jumped to his sister’s defense and struggled for the gun. During the struggle, Orlando was shot in the neck. He will never walk again.

In his voir dire and argument, the prosecutor did not seek advantage from the absence of the missing element in the charge as given. It was not a contested issue. We can find only three instances during voir dire and argument that might be viewed as touching upon the issue. During voir dire, the prosecutor explained to the jury that “if you’re a member of a criminal street gang, and you commit a crime with other members of that criminal street gang, then not only are you going to be held culpable, it’s going to be a higher punishment.” During his final argument, the prosecutor told the jury, “I’m going to warn you . . . this aggravated robbery option, that’s a red herring.” Later, he argued, “Derrell Hampton, Jeremie Wheeler, and Chester Vaughn, acting together, and they victimize an entire family.”

There was nothing incendiary or misleading in the prosecutor’s comments. The evidence left no room for doubt that the three gang members intended to participate in the aggravated

robbery as members of a criminal street gang. It is not reasonable to believe that Appellant would have benefitted from a correct charge requiring the jury to find that he committed aggravated robbery with “the intent to participate in” the aggravated robbery as a member of an organized street gang.” Appellant was not egregiously harmed. Appellant’s first issue is overruled.

EXCLUSION OF IMPEACHMENT EVIDENCE

In his second issue, Appellant maintains the trial court abused its discretion in preventing him from cross examining a State’s witness regarding relevant impeachment evidence. Appellant also contends the trial court’s exclusion of the proffered evidence was a violation of his right of confrontation.

Standard of Review

A trial court’s ruling on the admission of evidence is reviewed for an abuse of discretion. *Montgomery v. State*, 810S S.W.2d 372, 378 (Tex. Crim. App. 1990). The same standard applies to the trial court’s rulings regarding the scope of cross examination to show bias or lack of credibility. *Cantu v. State*, 939 S.W.2d 627, 635 (Tex. Crim. App. 1997).

The Sixth Amendment guarantees the right of an accused in a criminal trial to confront witnesses, which includes the right to cross examine witnesses to attack their credibility. *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). However, this right is not unqualified; the trial court has wide discretion in limiting the scope and extent of cross examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986); *see also Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000).

“Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness’s conduct in order to attack or support the witness’s character for truthfulness.” TEX. R. EVID. 608(b). The rules of evidence provide a specific exception to the application of the rules that requires the court to admit or exclude evidence if required to do so by the United States or Texas Constitution. TEX. R. EVID. 101(d).

Discussion

At trial, the State relied heavily on evidence that Appellant’s DNA was recovered from the pockets of the victim’s shorts. David Brake, a former DPS lab analyst, swabbed the pockets

of the victim's shorts with a wet swab, froze the swab, and forwarded it to the evidence locker. Chau Nguyen, another DPS analyst, performed the DNA tests on the swab.

The State called David Brake to establish the chain of custody of the swabs he used to swab the inside of the pockets of the victim's shorts. The State had filed a motion in limine seeking to prevent Appellant from eliciting evidence that Brake had been forced to resign from the DPS lab based upon a review of his work.

Prior to his testimony before the jury, both parties examined Brake during the hearing on the State's motion in limine. On cross examination, Brake explained that he participated in an advanced training program in screening and testing for advanced techniques in serology. He was asked to resign because a review of his work showed that he "was not adequately detecting all stains that might be present on an item." He testified that the training program had nothing to do with the report generated in this case. Brake did no DNA testing in this case. His job was limited to screening and collecting DNA evidence, which was later tested by Chau Nguyen. Brake's resignation was not related to "the techniques or methodology" employed in this case.

Appellant argues that the trial court should have permitted the jury to hear that the person who performed the DNA tests in this case had been forced to resign due to improper actions relating to his testing for DNA. Appellant argues that "[b]y denying [Appellant] the opportunity to cross examine Mr. Brake as to his prior problems with DNA testing procedure and subsequent resignation, the trial court not only abused its discretion but undermined [Appellant's] Sixth Amendment protections."

Appellant conceded during the hearing on the State's motion in limine that he sought to elicit evidence of Brake's resignation, not to attack Brake's credibility, but to show "the protocol, the guidelines that were given out by the Department of Public Safety that he didn't follow, Judge." But, as the trial judge observed, none of the procedures and techniques taught in Brake's advanced training course were involved in the procedure he used in making the swabs in this case. Appellant presented no evidence that Brake violated any swabbing procedure in swabbing the victim's shorts.

Appellant's argument ignores the uncontradicted record that shows Brake performed no DNA testing in this case. He merely made the swabs, froze them, and forwarded them for testing and analysis by Chau Nguyen. Appellant has not shown how the fact of Brake's unrelated resignation is relevant to prove the validity or invalidity of the tests Nguyen performed. "[T]he

Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Van Arsdall*, 475 U.S. at 679, 106 S. Ct. at 1435 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 295, 88 L. Ed. 2d 15 (1985)).

The trial court did not abuse its discretion in limiting Appellant’s cross examination of Brake to exclude evidence of Brake’s resignation. Appellant’s second issue is overruled.

DISPOSITION

Having overruled both of Appellant’s issues, we *affirm* the judgment of the trial court.

BILL BASS
Justice

Opinion delivered August 3, 2016.

Panel consisted of Hoyle, J., Neeley, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

AUGUST 3, 2016

NO. 12-15-00211-CR

DERRELL HAMPTON,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 241st District Court
of Smith County, Texas (Tr.Ct.No. 241-1644-14)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Bill Bass, Justice.

Panel consisted of Hoyle, J., Neeley, J. and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.