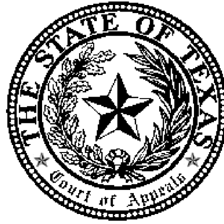
Affirmed and Opinion filed January 10, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-01249-CR

JERRY DWAIN GRAHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 31,753

O P I N I O N

Appellant Jerry Dwain Graham appeals from convictions for indecency with a child by contact and sexual assault, alleging (1) improper admission of extraneous offenses; (2) juror misconduct; and (3) unconstitutional jury charge instruction under Texas Rule of Criminal Procedure 37.07. We affirm.

I. Factual Background

The State charged appellant by indictment with indecency with a child by contact (two counts) and sexual assault (one count). A jury found appellant guilty of all three counts

and assessed punishment at ten years' imprisonment and a $2,500 fine for the two indecency counts. For the sexual assault charge, the jury assessed appellant's punishment at fifteen years' confinement and a $5,000 fine.

II. ISSUES PRESENTED

In four points of error, appellant contends (1) the trial court erred in allowing the State to present evidence of extraneous offenses; (2) the trial court erred in denying his motion for mistrial; (3) the trial court erred during the punishment phase by including an inapplicable jury instruction regarding good-conduct time; and (4) he suffered egregious harm because of the inapplicable good-conduct instruction.

A. Extraneous Offenses

In his first point of error, appellant complains the trial court erred by admitting evidence of extraneous offenses, arguing the prejudicial effect of the evidence outweighed its probative value. Because appellant has failed to adequately brief this point of error, he has waived appellate consideration. *See* TEX. R. APP. P. 38.1(h); *see also Lawton v. State*, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995) (overruling the defendant's argument for failure to brief adequately).

In his brief, appellant provides relevant statements of the law regarding admissibility of extraneous offenses. However, he failed to describe the conduct about which he complains. For example, he did not identify witnesses who testified about the extraneous offenses, why the trial court erred in admitting the testimony, and where in the record we would find the court's ruling admitting the extraneous offenses.

Under Texas Rule of Appellate Procedure 38.1(f), appellant must "state concisely and without argument the facts pertinent to the issues or points presented. . . . The statement must be supported by record references." TEX. R. APP. P. 38.1(f). Appellant's three-sentence statement of facts provides merely a hint of the background pertinent to his issue

including, for example, "The trial court also allowed ***to*** **[sic]** ***other persons to testify regarding extraneous offenses*** committed by appellant." (emphasis added). Citations to the record immediately after this statement, presumably leading us to the objectionable testimony, instead refer us to unrelated sections of testimony. For example, appellant cites reporter's record V, page 41, which includes a section of testimony revealing only that appellant discussed the possibility he would buy a 1986 Nissan for the witness. Appellant also cited page 60 of the same reporter's record. This page contains (1) the trial court instructing the jury about whether and how it could consider possible testimony about extraneous offenses and (2) a witness's response to the oath and a question about his name. Appellant also complains that the State referred to the extraneous offenses in closing arguments at the guilt-innocence and punishment phases of trial, "thus compounding the error." However, appellant fails to provide a citation to the record for this assertion; the end of the sentence merely displays an apparent note to include a cite to the record: "(record cite)."

Without proper citations to supporting evidence in the record, appellant did not carry his burden to show specifically how the trial court abused its discretion in admitting testimony over his extraneous offense and Rule 403(b) objections.[1] Moreover, appellant states that he preserved error by objecting (1) to introduction of extraneous offense evidence and (2) on Rule 403 grounds. Our review of the citations for these claims reveals pages that show (1) the court acknowledging a hearing held outside the jury's presence and (2) the administration of the oath and questioning of a witness on preliminary, identifying information. Thus, neither of the cites support the assertion that appellant made an objection

---

[1] For example, in arguing the trial court abused its discretion in finding evidence of extraneous offenses would not cause unfair prejudice, appellant merely argues that the State did not need the (as yet unknown) extraneous offense evidence:

> In the present case the State did not need the evidence to prove and [sic] contested matter. The victim consistently testified that appellant was the man who committed the assaults against him. The admission of extraneous offenses did nothing more than allow the jurors to convict appellant based on those crimes, and not the crimes for which he was charged.

necessary to preserve his complaint. *See, e.g., Narvaiz v. State*, 840 S.W.2d 415, 419, 428–29 (Tex. Crim. App. 1992) (holding capital murder defendant's objections to admissions of photographs of victims' bodies found at crime scene, on grounds that photographs were unfairly prejudicial, was not preserved for appeal when appellant failed to specify pages in record where alleged error could be found); *Thompson v. State*, 4 S.W.3d 884, 886–87 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (finding appellant failed to preserve objections to extraneous offense notice under Texas Rules of Evidence 403 and 404 and article 37.07 because objecting generally did not apprise the trial court of the basis of his complaint other than lack of notice); *Lape v. State*, 893 S.W.2d 949, 953–54 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (holding appellant who appeals trial court's ruling on objection must cite specific portion of record where objection occurs).

Under Texas Rule of Appellate Procedure 38.1(h), appellant must, through his brief, provide "a clear and concise argument for the contentions made, with *appropriate citations* to authorities and *to the record*." (emphases added). TEX. R. APP. P. 38.1(h). As demonstrated above, appellant either failed to cite to the record or misstated the citation. In addition, appellant failed to clearly provide arguments tailored to the facts of his case. We do not have, nor would we employ, the judicial resources needed to scour a record, much less an eleven-volume record, to find support for an appellant's claims or manufacture an appellant's arguments. *See, e.g., Garcia v. State*, 887 S.W.2d 862 (Tex. Crim. App. 1994) (holding that appellant before Court of Criminal Appeals must present his own case, stating his specific legal argument, specifying and citing from record factual bases for his argument and preservation of error in record, and argue case law, explaining its pertinence to his argument; court will not brief appellant's case for him).

The requirements to support one's factual assertions and arguments are not merely perfunctory. They are *minimum requirements*. In addition, though parties unfortunately provide them less frequently, we prefer citations to the record that include references to *line numbers in addition to page numbers* for *pertinent* information.

Appellant's first point of error is overruled.

B. Denial of Motion for Mistrial

In his second point of error, appellant complains the trial court erred by denying his motion for mistrial. Appellant contends an attorney overheard a juror commenting to another juror "to the effect of," "Why doesn't he [appellant] just plead and get this over with." Appellant argues the juror's speculation jeopardized his right to a fair and impartial jury because the "juror has essentially made up his mind prior to all evidence being presented, or . . . has speculated regarding 'other' evidence."

We review the trial court's denial of a mistrial for an abuse of discretion. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000). A trial court grants a mistrial as an extreme remedy for prejudicial events occurring during the trial process. *See Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996).

Here, the record reveals that the trial court asked each juror, individually, whether he or she heard or made a comment about the case. One juror testified he made a comment that "I thought since we were in there so long, I thought it was over." He also stated that he did not discuss that comment with any other jurors but that he thought another juror may have overheard him. None of the remaining jurors testified they heard or made any comment about the case. The juror who made the comment testified he could remain fair and impartial. In addition, the trial court instructed the jury, regarding his individual questioning of them, not to discuss or speculate what the incident was or how it began. He also instructed them not to make any comments about the case, the evidence, or the attorneys and not to discuss the case with anyone, including other jurors, until they begin deliberations.

Accordingly, with proper deference to the trial court, we hold there was no abuse of discretion in refusing to grant a mistrial. We overrule appellant's second point of error.

C. Good-Conduct Time Instruction – Article 37.07

In his third and fourth points of error, appellant contends the jury charge instruction required under article 37.07 was unconstitutional as applied because it violated the due course of law provision of Article I, Sections 13 and 19 of the Texas Constitution and the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution because it incorrectly stated the law. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon Supp. 2001). Appellant further contends he suffered egregious harm by the trial court's reduction of time in prison for good conduct instruction because he was ineligible for the reduction.

We decided this issue in *Gilmore v. State*, No. 14-99-00895-CR, slip op. at 2, 2001 WL 1168847, at *1 (Tex. App.—Houston [14th Dist.] Oct. 4, 2001, no pet. h.).[2] As in *Gilmore*, because this appellant did not object to the jury charge instruction, we review the instruction under the appropriate statutory standard of review for fundamental error in the charge. *See id.* Article 36.19 of the Code of Criminal Procedure establishes the standard for fundamental error in the court's charge: "the judgment shall not be reversed . . . unless it appears from the record that the defendant has not had a fair and impartial trial." It is appellant's burden on appeal to show the erroneous charge resulted in such egregious harm that he did not receive a fair and impartial trial. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

We have considered this issue before and have determined that the "good-conduct time" instruction, mandated by article 37.07 is not unconstitutional.[3] *See Gilmore*, 2001 WL

[2] We note that this issue is currently before the Court of Criminal Appeals.

[3] *But see, e.g., Jimenez v. State*, 992 S.W.2d 633, 638 (Tex. App.—Houston [1st Dist.] 1999), *aff'd on other grounds*, 32 S.W.3d 233 (Tex. Crim. App. 2000) (holding the court's charge to the jury on good-conduct time as mandated in article 37.07, section 4(a) was unconstitutional because it required an instruction that is an incorrect statement of the law under the facts of the case).

1168847, at *1; *Edwards v. State*, 10 S.W.3d 699, 705 (Tex. App.—Houston [14th Dist.] 1999, pet. granted). In *Gilmore*, we relied on *Edwards* in holding that article 37.07 did not violate that appellant's due process rights because the instruction as a whole correctly described the calculation of parole eligibility and the role of good-conduct time in reducing the period of incarceration. *See Gilmore*, 2001 WL 1168847, at *1 (citing *Edwards*, 10 S.W.3d at 705). Significantly here, as in *Gilmore* and *Edwards*, the jury was warned that the award of good-conduct time cannot be predicted and jurors should not consider the extent to which good-conduct time might be awarded. *See id.* Thus, the same rationale applies in our case. We find that appellant has not shown egregious harm.

Therefore, we overrule appellant's third point of error.

Having overruled all issues presented, we affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).