Affirmed and Opinion filed January 11, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00950-CR

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JOHN GILBERT KEENER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 782,094

O P I N I O N

The jury found appellant, John Gilbert Keener, guilty of aggravated sexual assault of a child, and assessed punishment at thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant presents six points of error on appeal, raising (1) legal and factual insufficiency of the evidence; (2) errors in the jury charge; (3) failure of the trial court to instruct the jury on the State's burden of proof regarding extraneous offenses; (4) ineffective assistance of counsel; and (5) erroneous admission of evidence. We affirm.

FACTUAL BACKGROUND

Aloma, the complainant's mother, retained appellant, an attorney, to represent her in a divorce action. Complainant, J.G., was three years old at the time. The relationship between Aloma and appellant became a personal one, and Aloma's children would often play with appellant's daughter, or appellant would babysit the children.

On one occasion, Aloma's children spent the night at appellant's house. It was after that visit that J.G. began having behavioral changes. She had frequent nightmares and would wake up crying. She would no longer let her mother clean her private area and would change her clothes privately in another room. J.G. eventually told her babysitter that appellant had taken her into his bedroom, locked the door, pulled his pants down and told her that if she "sucked his wiener, he would give her a prize."

The babysitter told Aloma about this incident, and Aloma noticed a fingernail scratch on J.G.'s vaginal area. Aloma took J.G. to a pediatrician, but the child was very frightened and would not let the doctor examine her. A Child Assessment Center employee conducted a videotaped interview of J.G., during which J.G. said that appellant stuck his finger inside of her and hurt her. Another doctor who examined J.G. concluded that her injuries were consistent with vaginal and rectal trauma. At trial, J.G. testified that appellant had touched her in her private area with his hand and hurt her. She demonstrated the incident for the jury with anatomical dolls. The jury found appellant guilty of aggravated sexual assault.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

By his first two points of error, appellant raises legal and factual insufficiency of the evidence to prove the element of sexual penetration. Aggravated sexual assault is established by proving that the defendant "intentionally or knowingly causes the penetration of the anus or female sexual organ of a child by any means." TEX. PEN. CODE ANN. § 22.021(a)(1)(B) (Vernon Supp. 2000). Penetration can be shown through circumstantial evidence or by J.G.'s own testimony. *Nilsson v. State*, 477 S.W.2d 592, 595 (Tex. Crim. App. 1972) (circumstantial evidence); *Cagle v. State*, 976 S.W.2d 879, 880 (Tex. App.—Tyler 1998, no pet.) (citing *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978) (complainant's own testimony)).

The standards for sufficiency reviews are well-established. Under a legal sufficiency review, we

are to view the evidence in the light most favorable to the judgment, and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). Under a factual sufficiency review, we consider all of the evidence equally, and do not view the evidence in the light most favorable to the verdict. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We keep in mind, however, that the jury is the sole judge of the facts, credibility of witnesses and weight to be given the evidence, including resolution of conflicting testimony in the record. *Johnson*, 23 S.W.3d at 7.

The record here reveals statements from J.G. herself that appellant had penetrated her sexually with his finger and hurt her; this physical trauma was substantiated by medical testimony. While appellant contends that the evidence shows that J.G.'s brother, Eric, was the actual perpetrator, this was a question for the jury to resolve. We find that a rational trier of fact could find beyond a reasonable doubt that appellant sexually penetrated J.G., and that the jury's verdict is not so contrary to the weight of the evidence as to be clearly wrong and unjust. The evidence is legally and factually sufficient to support the judgment, and appellant's first and second points of error are overruled.

"GOOD-CONDUCT TIME" JURY CHARGE

Under his third point of error, appellant argues that the trial court erred during punishment in instructing the jury as to "good-conduct time," as he was not eligible for a reduction of time while serving time for aggravated sexual assault of a child. In connection with this point, the pertinent portions of the charge given to the jury are set out below:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at

rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or thirty years, whichever is less, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Appellant did not object to this instruction at trial[1]. The Texas Court of Criminal Appeals has recently ruled that where the defendant fails to object to a good-conduct time instruction which is inapplicable to his alleged offense, the applicable standard on review is that of fundamental error; the judgment is not to be reversed unless it appears from the record that appellant did not have a fair and impartial trial. *Jimenez v. State*, 32 S.W.3d 233 No. (Tex. Crim. App. 2000). In discussing the applicable standard of review, the Court did not address the question of whether it was error for the trial court to give the instruction. We will not assume error. Therefore, before we apply the standard of review for charge error, we will consider whether it was error in this case to give the instruction.

This instruction is mandated in all non-capital felonies. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g(a) (Vernon Supp. 2000); *Cagle v. State* 23 S.W.3d 590, 593 (Tex. App.—Fort Worth 2000, pet filed). This court, as well as other courts, have addressed (1) the constitutionality of this instruction when given in a case in which the defendant is not eligible for "good-conduct time" and (2) whether the instruction

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[1] At trial, appellant objected to the jury charge as follows: "I have reviewed the court's charge and the defense would object to the second page regarding the parole instruction and ask that it be deleted." This objection at trial does not comport with his argument on appeal, and requires us to review this issue under the fundamental error standard.

was misleading when a defendant is not eligible for "good conduct time". *Cagle* 23 S.W.3d at 594; *Martinez v. State*, 969 S.W.2d 497 (Tex. App.—Austin, 1998 no pet.); *Luquis v. State*, 997 S.W.2d 442 (Tex. App.—Beaumont 1999, pet. granted); *Espinosa v. State*, 29 S.W.3d 257, 261-62 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.); *Edwards v. State*, 10 S.W.3d 699, 705 (Tex. App.—Houston [14th Dist.] 1999, pet. granted). These courts have held that it was not error to give the instruction. *Cagle*, 23 S.W.3d at 594; *Martinez*, 969 S.W.2d at 499; *Luquis*, 997 S.W.2d at 443-44; *Espinosa*, 29 S.W.3d at 261-62; *Edwards*, 10 S.W.3d at 705. *But c.f.*, *Hill v. State*, 30 S.W.3d 505, 508-09 (Tex. App.—Texarkana 2000, no pet. h.) (holding that giving a good-conduct time instruction amounted to egregious harm).

We find that our prior rationale in *Espinosa* and *Edwards*, and the rationale given by the other courts, applies to this case. Therefore, we conclude that it was not error for the judge to give the instruction to the jury and we overrule appellant's third point of error.[2]

EXTRANEOUS OFFENSE BURDEN OF PROOF

In his fourth point of error, appellant contends that the trial court erred in failing to instruct the jury not to consider any extraneous offense unless it found beyond a reasonable doubt that appellant committed such offense. We agree with appellant that when evidence of an extraneous offense is presented during punishment, the jury should be instructed not to consider such offense unless the State proves beyond a reasonable doubt that appellant committed the offense. *Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996). The defendant is entitled to such an instruction, even absent a request. *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). Thus, here, although appellant failed to request this instruction during the punishment phase of the trial below, the trial court, was required to give a reasonable doubt instruction in the charge. *Id*. Having failed to do so, the trial court erred. *Id*.

[2] Having reached this conclusion, we also note that the State did not mention either good-conduct time or parole during its closing arguments at punishment and, that, although the punishment range for appellant's offense was five to ninety-nine years, the jury assessed punishment at thirty years, despite the State's pleas for a higher range of punishment. Thus, even if it had been error to submit the instruction, we would not have found the error to amount to egregious harm.

When the trial court fails to submit this instruction, this Court is to conduct the harm analysis prescribed in *Almanza v. State*. *Huizar*, 12 S.W.3d at 484-85. In *Almanza* the Texas Court of Criminal Appeals instructs us that where, as here[3], a defendant does not object to error in the charge, he may obtain reversal only where he "claim[s] that the error was 'fundamental' . . . [and] the error is so egregious and created such harm that he 'has not had a fair and impartial trial' . . . ." *Id*. 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). To determine whether the error caused egregious harm, the appellate court must consider all parts of the record that bear upon the subject. *Id*.; *Davis v. State*, 28 Tex. Ct. App. 542, 13 S.W. 994, 995 (1890). This includes "the entire jury charge, the state of the evidence, including 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." *Almanza*, 686 S.W.2d at 171.

We turn first to the punishment phase, where the extraneous offenses were admitted. During that phase of trial, the extraneous offenses came into evidence through testimonial evidence both from appellant's former stepdaughter and from his former wife. His former stepdaughter stated that appellant walked into her bedroom, in the nude, and offered her $100.00 if she would have sex with him. The State also presented testimony that the stepdaughter subsequently fled the house and returned later with her mother, her aunt, and her uncle, and that appellant pointed a shotgun at them at the door of their home. Further, the evidence revealed that, though his stepdaughter called the police, appellant was not arrested and no charges were filed against him. At the punishment phase, appellant waived his request for probation. Instead, he asked the jury to assess his punishment at five years' confinement in prison. The State asked for a punishment somewhere in the middle range of 5 to 99 years. Appellant was sentenced to thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

After reviewing the record as a whole, we cannot conclude that appellant was denied a fair and impartial trial. First, appellant did not contest the testimony of his former stepdaughter or his former wife, but merely emphasized that he had not been arrested for that incident. Secondly, the State did not rely solely on this extraneous offense as a basis for punishing appellant. Instead, the State's closing argument

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[3] *See supra.* n.1.

in the punishment phase relied heavily on appellant's actions against the complainant in this case, and how he took her innocence away. The State used the extraneous offense testimony of appellant's former stepdaughter to ask the jury to infer an ongoing course of conduct by the appellant. For these reasons, the inclusion of the proper jury instruction would not have made the State's case any less persuasive. In addition, the jury sentenced appellant to thirty years' confinement which is in the lower range of punishment for an offense of this type. Accordingly, we conclude that appellant did not suffer "egregious harm" as a result of the court's failure to submit a reasonable doubt instruction to the jury in the punishment charge. We overrule appellant's fourth point of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant's fifth point of error alleges ineffective assistance of counsel during the punishment phase of trial, based on trial counsel's (1) failure to object to the instruction regarding good-conduct time; (2) failure to request a jury instruction on the State's burden of proof on extraneous offenses; and (3) failure to request that a definition of reasonable doubt be included in the jury charge.

To show ineffectiveness of counsel, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). The burden of proof to establish ineffectiveness of counsel is on appellant, who must overcome the presumption that the challenged action falls within the wide range of reasonable professional assistance, or that it might be considered sound trial strategy. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). To overcome this presumption, a claim for ineffectiveness must be firmly founded and affirmatively demonstrated in the record. *Id*. In evaluating counsel's representation, the totality of his representation will be examined. *Id*.

Even assuming that appellant's counsel erred in not objecting to the good-conduct time jury charge, appellant has not demonstrated that but for this error, the result of the proceeding would have been different. As we previously discussed, the jury was instructed not to consider the extent to which parole law or good-conduct time might be applied to appellant, and appellant has not shown that the jury

violated this instruction. Moreover, despite the State's pleas for a higher range of punishment, the jury assessed punishment at thirty years. Appellant has not established that counsel was ineffective in failing to object to the subject charge.

Appellant's second argument – that counsel was ineffective in failing to request an instruction on the State's burden of proof for extraneous offenses – likewise fails. Texas courts are required to give a reasonable doubt instruction regarding extraneous offenses, even absent a request. *Huizar*, 12 S.W.3d at 484. However, failure, during the punishment phase, to request an instruction on the burden of proof required for consideration of extraneous offenses during the punishment phase is not necessarily ineffective assistance of counsel.

In regards to the totality of counsel's representation, the record reflects that throughout both phases of trial, defense counsel thoroughly examined witnesses, objected to evidence and vigorously argued on appellant's behalf. Moreover, under point of error four, we have already held that appellant received a fair trial. Consequently, on this record, there is no showing that, but for counsel's errors, the result of the proceeding would have been different.

As to appellant's third claim of ineffective assistance, we reach the same conclusion. Appellant argues that his counsel should have requested that the jury be charged with the definition of "reasonable doubt." The reasonable doubt definition, as set out in *Geesa v. State*, charges the jury that,

> A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.
>
> Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

820 S.W.2d 154, 162 (Tex. Crim. App. 1991). In *Fields v. State*, the Texas Court of Criminal Appeals held that this definition applies specifically to the guilt-innocence phase of a trial. 1 S.W.3d 687, 688 (Tex. Crim. App. 1999). The court further reasoned that at the punishment phase, the defendant has already been found guilty of each element of the offense charged. *Id*. Evidence of extraneous crimes or

bad acts is not to be considered by the jury until it "is satisfied beyond a reasonable doubt that these prior acts are attributable to the defendant." *Id*. After this requirement is met, the jury may "use the evidence however it chooses *in assessing punishment*." *Id*. The court explains that because extraneous offense evidence serves a different purpose from evidence presented at the guilt-innocence phase of a trial, neither *Geesa* nor article 37.07 of the Texas Code of Criminal Procedure require that a reasonable doubt instruction be given at the punishment phase, absent a request. *Id*.

As to whether it was ineffective assistance in this case not to ask for the definition, we note that the same jury decided both guilt and punishment. As a result, this jury was given the reasonable doubt definition the previous day during the guilt-innocence phase of trial. Although we are inclined to agree that counsel's failure to request the *Geesa* instruction is questionable trial strategy, we do not believe that counsel's failure to request the *Geesa* instruction would have made a difference in the trial outcome. *Autry v. State*, 27 S.W.3d 177, 181 (Tex. App.—San Antonio, 2000, pet. ref'd.). We conclude that appellant fails the second prong of the *Strickland* test in that he has not shown that the lack of a *Geesa* instruction prejudiced him.

We overrule appellant's fifth point of error.

ERRONEOUS ADMISSION OF EVIDENCE

By his sixth and final point of error, appellant argues that the trial court erred in overruling his objection to evidence that Aloma had suffered a vaginal scratch similar to the one sustained by J.G. During guilt-innocence, Aloma testified that she had sustained the scratch from appellant's hand during her sexual relationship with appellant. The trial court admitted the evidence over appellant's relevancy objection. Relevant evidence is admissible if it has any tendency to make the existence of any fact more or less probable than it would be without the evidence. TEX. R. EVID. 401. The trial court's decision to admit or exclude evidence should not be disturbed absent a clear showing of abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990).

We find no abuse of discretion, as the trial court could have properly concluded that the evidence tended to make it more probable than without the evidence that appellant sexually assaulted

J.G. Appellant's sixth point of error is overruled.

The judgment is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 11, 2001.

Panel consists of Justices Fowler, Edelman and Baird.[4]

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

[4] Former Judge Charles F. Baird sitting by assignment.