Affirmed as Reformed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00531-CR

THURMAN BERZIA WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 783,060

O P I N I O N

Appellant was charged by indictment with the offense of aggravated assault. A prior felony conviction was alleged for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense and further found appellant used or exhibited a deadly weapon during commission of the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2). Following appellant's plea of true to the enhancement allegation, the jury assessed punishment at confinement for life in the Texas Department of Criminal Justice—Institutional Division. Appellant raises three points of error. We affirm the judgment of the trial court as reformed.

I.

The first point of error relates to the instruction required by Texas Code of Criminal Procedure article 37.07, section 4(a), which the trial court gave the jury in the instant case. Article 37.07, section 4(a) provides:

> In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense of which the jury has found the defendant guilty is listed in Section 3g(a)(1), Article 42.12, of this code or if the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, of this code, unless the defendant has been convicted of a capital felony the court shall charge the jury in writing as follows:
>
> "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 30 years, whichever is less, ***without consideration of any good conduct time he may earn***. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. 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." (emphasis added)

Appellant contends this instruction violated the Due Process and Due Course of Law Clauses of the United States and Texas Constitutions. As a general rule, this instruction does not violate either the due course of law provisions in Article I, sections 13 and 19 of the Texas Constitution or federal due process. *See Oakley v. State*, 830 S.W.2d 107, 111-12 (Tex. Crim. App. 1992); *Muhammad v. State*, 830 S.W.2d 953, 956 (Tex. Crim. App. 1992).

However, appellant relies on *Jiminez v. State*, 992 S.W.2d 633, 637-39 (Tex. App.—Houston [1st Dist.] 1999, pet. granted), which found an exception to this general rule. The *Jiminez* Court held that in certain cases the article 37.07, section 4(a) instruction was unconstitutional under 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. The court held the instruction was an incorrect statement of the law because Jiminez was not eligible for good conduct time because he was convicted of an offense enumerated in section 508.149 of the Texas Government Code that precludes the accumulation of good conduct time to qualify a convict for early release under mandatory supervision. Appellant argues the same is true in the instant case because the jury's finding that a deadly weapon was used or exhibited during commission of the offense prohibits appellant from accruing good conduct time. *See* § 508.149(a)(1).

The State argues *Jiminez* was wrongly decided and that this case should be resolved under the authority of *Boston v. State*, 965 S.W.2d 546, 549-50 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). In *Boston*, this court, relying on the emphasized portions of article 37.07, section 4(a) noted above, held that the instruction, when read in its entirety and viewed in context was proper because it "clearly informed the jury that any 'good conduct time' appellant might earn *could not* be applied to reduce his sentence until he first served half of that sentence." *Id.* at 550-51. (emphasis in original) We believe resolution of this case is controlled by our opinion in *Boston*. Accordingly, the first point of error is overruled.

II.

The second point of error contends the trial court erred in overruling appellant's motion for mistrial following an improper argument made by the State. During the punishment phase of trial, the following exchange occurred:

> THE STATE: [Appellant] is not going to stop. He intended to do it, then it escalated from burning [the complainant's] house, from the threats to burning her house.
>
> DEFENSE COUNSEL: Going to object, Your Honor. There is no evidence that he burned her house.
>
> THE COURT: Stay in the record, Counsel. The jury heard the evidence. Proceed with your argument.
>
> DEFENSE COUNSEL: I would like for the jury to disregard the last remark.
>
> THE COURT: Ladies and gentlemen, the last remark is stricken. You are hereby ordered by the Court to please disregard that and don't consider that statement for any purpose, whatsoever.
>
> DEFENSE COUNSEL: Move for a mistrial.
>
> THE COURT: Overruled and denied. Go ahead, please.

While we agree with the trial court that the argument was improper, the question is whether the instruction to disregard the argument was sufficient to cure the error. In *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App.1987), *cert. denied* 484 U.S. 905 (1987), the Court of Criminal Appeals stated:

> In the vast majority of cases in which argument is made or testimony comes in, deliberately or inadvertently, which has no relevance to any material issue in the case and carries with it some definite potential for prejudice to the accused, this Court has relied upon what amounts to an appellate presumption that an instruction to disregard the evidence will be obeyed by the jury. *See* 1 R. Ray, Texas Practice, Law of Evidence, § 29 (3rd ed.

1980). *Thompson v. State*, 612 S.W.2d 925 (Tex. Crim. App. 1981). In essence this court puts its faith in the jury's ability, upon instruction, consciously to recognize the potential for prejudice, and then consciously to discount the prejudice, if any, in its deliberations.

Relying on this appellate presumption, we find the jury disregarded the improper argument made by the State.[1] Additionally, we note the State did not continue this argument following the trial court's instruction. Finally, we observe that appellant argues the comment was harmful, in part, because "the jury charge was erroneous." However, as discussed in part I of this opinion, we believe the instruction was proper. For these reasons, we overrule the second point of error.

III.

Finally, appellant notes that the judgment states appellant was charged with a third degree, rather than a second degree, felony. At the time of the commission of the instant offense, Texas Penal Code section 22.02(b) prescribed the range of punishment for the offense of aggravated assault as that of a second degree felony. Therefore, that portion of the judgment of the trial court, which lists the offense as a third degree felony is incorrect. Accordingly, we order the judgment modified to reflect the offense of aggravated assault is a second degree felony. *See* TEX. R. APP. P. 43.2(b) ("The court of appeals may: ... (b) modify the trial court's judgment and affirm it as modified;").

As modified, the judgment of the trial court is affirmed.

/s/ Charles F. Baird

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[1] We pause to note that had the trial court not sustained the objection and instructed the jury to disregard the argument, we would be forced to employ an opposite presumption, namely that a trial court, by overruling an objection to an improper argument, puts "the stamp of judicial approval" on the improper argument, thus magnifying the possibility for harm. *See Good v. State*, 723 S.W.2d 734, 738 (Tex. Crim. App. 1986); *Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983).

Justice

Judgment rendered and Opinion filed April 27, 2000.

Panel consists of Justices Amidei, Anderson and Baird.[2]

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

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