Affirmed and Opinion filed May 10, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00516-CR

———————————

RICHARD LEE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 797,355

O P I N I O N

A jury convicted appellant, Richard Lee Williams, of aggravated robbery of an elderly person and, following his plea of true to an enhancement allegation, sentenced him to thirty years in the Texas Department of Corrections. In three points of error, appellant complains that (1) the trial court erred by not instructing the jury, during punishment, that the State had to prove extraneous offenses beyond a reasonable doubt; (2) the State, during its closing, commented on his failure to testify; and (3) he received ineffective assistance of counsel based upon his lawyer's failure to object to the State's closing argument which purported to comment on his failure to testify. We affirm.

I. Factual Background

Appellant was charged with the aggravated robbery of his seventy-four-year-old mother. According to his mother's testimony, appellant arrived at her home and asked if he could do some laundry. She agreed. Appellant then approached her from behind as if to hug her, something she had become accustomed to. Suddenly, however, he grabbed her by the throat, threw her to the ground, and demanded that she give him money. Other family members tried to intervene, but appellant told them that he would kill his mother if they refused to leave. When Mrs. Williams's husband went down the hall to get a gun, appellant's mother threw $45.00 at him, and appellant fled with the money. Mrs. Williams testified that, as a result of the attack, she suffered a cracked tooth caused by appellant hitting her in the mouth as well as other minor but painful injuries. The only other witness for either party, the officer who was called to the house after this incident, corroborated the victim's testimony concerning the nature of her injuries as well as their recent origin.

II. Extraneous Offenses

In his first point of error, appellant complains that the trial court erred during the punishment phase in failing to instruct the jury on the State's burden of proof concerning evidence of extraneous offenses.[1] We agree. The court's failure to instruct the jury upon reasonable doubt in the punishment phase, however, does not result in automatic reversal, as urged by appellant. *Huizar v. State*, 12 S.W.3d 479, 484–85 (Tex. Crim. App. 2000). The failure to properly instruct a jury on the State's burden of proof at the punishment phase is an error of statutory origin, not of constitutional origin. *Id*. at 484. Accordingly, such error is mere charge error, subject to a harm analysis under *Almanza*. *Id*. (citing *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g)).

Almanza set forth a bifurcated approach for appellate courts to employ when

[1]During the punishment phase, the State introduced evidence of appellant's prior convictions for assault, burglary of a habitation with intent to commit theft, and theft from a person ("the extraneous offenses"). Additionally, the State introduced appellant's robbery conviction—the felony alleged in the enhancement paragraph.

determining whether a defendant suffered harm. 686 S.W.2d at 171. If the defendant made a timely objection to the trial court, reversal is required if the error was "calculated to injure the rights of [a] defendant," *i.e.*, the defendant must suffer only *some* harm. *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981)). Conversely, if the defendant failed to object, then reversal is not required unless it is shown that such harm resulted in the defendant being denied "'a fair and impartial trial'—in short 'egregious harm.'" *Id*. Here, appellant did not object to the failure of the court's charge to include a "beyond a reasonable doubt" instruction. Therefore, reversal is necessary only if we conclude that the record supports a finding that appellant suffered egregious harm. In determining whether egregious harm occurred, we review the error "in light of the entire jury charge, the state of the evidence, including the 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.

At the punishment phase of the trial, appellant pled true to the allegation in the enhancement paragraph. The State then proceeded to introduce, without objection, evidence of the robbery conviction in the enhancement paragraph, as well appellant's convictions for the extraneous offenses. During appellant's direct testimony, he admitted that he had committed the extraneous offenses.

Several courts of appeals have found that no egregious harm on similar facts. *See, e.g.*, *Shanks v. State*, 13 S.W.3d 83, 87–88 (Tex. App.—Texarkana 2000, no pet.) (finding no egregious harm where defendant admitted to only some of the extraneous offenses, while denying others); *Collins v. State*, 2 S.W.3d 432, 436 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (finding no egregious harm where the evidence against the defendant "was strong, uncontradicted, and unimpeached [and] defense counsel virtually conceded its truth."); *Coleman v. State*, 979 S.W.2d 438, 444 (Tex. App.—Waco 1998, no pet.) (finding no egregious harm where defendant stipulated to three extraneous offenses). Here, appellant took the witness stand and admitted "without hesitation" that the he had committed each of the extraneous offenses. His lawyer, in arguing during closing that appellant's trouble with the

police was caused by his drug addiction, stated appellant had "been to prison before." Based on our review of the record, we find that appellant did not suffer egregious harm as a result of the trial court's failure to include an instruction regarding the State's burden of proof as to the extraneous offenses. Appellant's first point of error is overruled.

III. Prosecutor's Comment on Appellant's Failure to Testify

In his second point of error, appellant contends that "the State erred when it commented on the appellant's failure to take the stand during its jury argument."[2] His third point of error alleges trial counsel was ineffective for failing to object to the State's comment.

Appellant's second point has not been preserved for appeal. "As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely objection . . . ." TEX. R. APP. P. 33.1(a)(1). Here, appellant did not object to the State's closing argument. "A defendant's failure to object to a jury argument . . . forfeits his right to complain about the argument on appeal." *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (citing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)).

Assuming without deciding that the State's closing argument was a comment on appellant's failure to testify,[3] we find that it was a proper response to statements made by defense counsel during opening statements. The State made the following comment during closing argument:

---

[2]We note that only the trial court can commit error, not the State. *See, e.g., Moreno v. State*, 821 S.W.2d 344, 353–54 (Tex. App.—Waco 1991, pet. ref'd) (noting that, with the exception of fundamental error, an error occurs only when the court acts or fails to act).

[3]*See, e.g., Livingston v. State*, 739 S.W.2d 311, 338 (Tex. Crim. App. 1987) (holding that, if the remark can be reasonably construed as a comment on the defendant's failure to produce testimony or evidence from sources *other than himself*, reversal is not required). The record in this case demonstrates that appellant's lawyer attempted to elicit testimony from appellant's mother that appellant appeared under the influence of illegal narcotics at the time of the robbery. The record further indicates other family members were present and could have testified as to whether appellant appeared to be under the influence of drugs.

> Now, [defense counsel], in all his efforts, as he told you on voir dire, if he tells you something, he needs to prove it. And I'm sure, if he had any evidence, he would have been able to do that in this case with you. He couldn't. He told you on opening statement that you're really going to find out that the [appellant] didn't know what he was doing, that, in fact, he was induced or driven by drugs. [Defense counsel] couldn't keep that promise.

The foregoing argument was a proper response to defense counsel's remarks during opening statements that appellant "never intended to physically hurt his mother," but rather was "induced and driven by drugs." *See, e.g., Martinez v. State*, 851 S.W.2d 387, 389–90 (Tex. App.—Corpus Christi 1993, pet. ref'd) (noting that State may answer opposing counsel's jury argument, even if it includes a comment on the defendant's failure to testify) (citing *Porter v. State*, 601 S.W.2d 721, 723 (Tex. Crim. App. 1980)). Because the argument was not improper, we find trial counsel was not ineffective for failing to object to it. We overrule appellant's second and third points of error.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed May 10, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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