Affirmed and Opinion filed August 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00033-CR

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WILLIAM GARY WARNECKE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 97CR0605

O P I N I O N

Appellant was charged by indictment returned by a Galveston County Grand Jury with having on the 7th day of February, 1997 engaged in sexual contact with R. F., a male child under the age of 17 years by touching the genitals of R. F. with appellant's hand with intent to arouse and gratify the sexual desires of appellant. Appellant pled not guilty and was convicted by a jury of indecency with a child by contact as charged in the indictment. The jury also heard evidence on punishment and assessed a ten-year term of incarceration in the Institutional Division of the Texas Department of Criminal Justice. On appeal, appellant contends (1) that

he received ineffective assistance of counsel at the guilt/innocence phase of the trial; (2) that the trial court committed reversible error by inclusion in the Court's charge that the jurors' sole duty was to determine the "guilt or innocence" of the defendant; (3) that the prosecutor engaged in impermissible jury argument during the guilt/innocence phase of the trial and during the punishment phase of the trial. We affirm.

FACTS

At the time of the conduct alleged in the indictment, the complainant along with his mother and sister were living with appellant at appellant's house. The complainant testified that appellant and he were sleeping in the same bed at appellant's house and that appellant fondled and rubbed the complainant's penis. The State, during its main case, put on testimony concerning an aggravated sexual assault by appellant of a second victim. The second victim was a friend of the complainant. During the trial, the jury received appellant's statement given to a police officer and also heard testimony from appellant. Appellant contended that he was "set-up" by the two alleged victims. To this extent, he offered the testimony of a third alleged victim who denied that he had been molested by appellant. Both at a pre-trial hearing and during argument, appellant's counsel contended that a conspiracy existed between the two alleged victims, to sever the relationship that existed between appellant and the complainant's mother.

INEFFECTIVE ASSISTANCE

In his first point, appellant contends that he received ineffective assistance of counsel at the guilt/innocence phase of the trial in that during appellant's opening statement to the jury he made the jury aware of appellant's other indictment of aggravated sexual assault of a child concerning the second victim. Appellant also contends that trial counsel failed to object to questioning on cross-examination of appellant by the State concerning the fact that appellant's bond had been forfeited.

During his opening statement, appellant's attorney stated that within a day of the

complainant telling his father of appellant's touching him, another boy told the complainant's father that appellant had sexually assaulted him. Appellant's attorney further stated that when questioned by an investigator, the complainant said he knew of two people who had been assaulted by appellant. Further, appellant's attorney stated he had spoken to another boy who claimed the complainant and the second victim were "setting [appellant] up." The second victim later testified for the State during the State's main case.

Appellant also argues that trial counsel was ineffective because he failed to object to questions of appellant by the prosecutor on cross-examination of appellant concerning appellant's bail bond being forfeited while out on bond for the instant offense. Appellant also complains that trial counsel failed to object to the prosecutor's statements regarding the bond forfeiture during closing argument to the effect that "Mr. Warnecke fled because he wanted to flee. He didn't want to get caught . . . and later on when he got out and tried to flee and had to come back and was arrested and he's back in jail[.]"

The State contends that the trial strategy of appellant's counsel was to inform the jury of the second indictment as part of a conspiracy against appellant by the victim and his friend, the friend being the second victim alleged in the second indictment. The State points out that in closing argument appellant's counsel stated:

> In most situations, you are only charged with one indictment at a time . . . I chose to bring this evidence in here because I do - I honestly believe that by bringing in the second one, it makes the first one highly unlikely. I think the fact is that these two boys were in a [sic] collusion together, and the dates show it. The dates clearly show it . . . They didn't think out their story very well . . . probably at first, it was a way to get Gary away from his mother. Let's make an allegation, let's come up with something, and let's get him away.

The State argues that trial strategy will be reviewed only if the attorney's actions are without any plausible basis, citing *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd), and *Simms v. State*, 848 S.W.2d 754, 757 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

Whether appellant received effective assistance of counsel at either phase of the trial is now governed by *Strickland v. Washington*, 466 U.S. 668 (1984) and *Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App.1986) (adopting *Strickland* as applicable standard under the Texas Constitution). The test is whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) whether there is a reasonable probability that but for counsel's deficient performance, the result of a proceeding would have been different. *See Strickland*, 466 U.S. at 682.

Since the matter was clearly a matter of trial strategy, as to the introduction of the fact that the defendant was also charged in a second indictment because of his conduct with a second victim, the fact that that strategy was not successful does not constitute grounds for finding ineffective assistance of counsel. The Court of Criminal Appeals has held that an appellate court may not hold that trial strategy, which did not develop as planned, constitutes such ineffective assistance of counsel that would require reversal. *See Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 803 (2000). Appellate courts are not in a position to second-guess through appellant hindsight the strategy adopted by counsel at trial. *See State v. Recer*, 815 S.W.2d 730, 731 (Tex. Crim. App. 1991); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

As to appellant's contention that trial counsel was ineffective by failing to object to the introduction of evidence brought out on cross-examination of the appellant about appellant's bond forfeiture, such was admissible to show that the appellant evidenced a guilty conscience because of the conduct alleged in the indictment. *See Thames v. State*, 453 S.W.2d 495 (Tex. Crim. App.1970) *judgment vacated in part on other grounds by Thames v. Texas*, 408 U.S. 937 (1972); *Bogert v. State*, 681 S.W.2d 822 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd).

Because the law allows evidence concerning appellant's bond forfeiture to be introduced to show flight, counsel did not provide ineffective assistance by failing to object

to the introduction of such evidence on cross examination of appellant. *See Milburn v. State*, 973 S.W.2d 337 (Tex. App.—Houston [14th Dist.] 1998), *judgment vacated in part on other grounds*, 3 S.W.3d 918 (Tex. Crim. App. 1999). Bond forfeiture is admissible of flight. *See Logan v. State*, 510 S.W.2d 598, 600 (Tex. Crim. App. 1974).

We overrule appellant's first point of error.

COURT'S CHARGE

In his second point of error, appellant complains that the trial court committed reversible error by inclusion in the court's charge that the jurors' sole duty is to determine the "guilt or innocence" of the defendant.

The court's charge given to the jury on the issue of guilt or innocence stated:

> Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this case; and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

Appellant argues that by so charging, the court committed constitutional error in violation of due process of law as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Texas Constitution.

Appellant contends that the duty of the jury is to determine whether or not the State has proven beyond a reasonable doubt that the defendant committed the crime and not to determine whether the defendant is guilty or innocent. Appellant argues that since this is constitutional error, we must reverse the judgment of guilt unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment, citing TEX. R. APP. P. § 44.2(a), (b). He further argues that the error should be analyzed under the federal harmless error standard and is controlled by Article 36.19 of the Texas Code of Criminal Procedure and *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

The State contends that appellant made no objection to the jury charge and that neither

party referred to that portion of the jury charge in question during final argument. The State points out that the court charged the jury on the presumption of innocence and the burden of proof that is required to remove that presumption, as follows:

> All persons are presumed innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt . . . The law does not require a Defendant to prove his innocence or produce any evidence at all. The presumption alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt after careful and impartial consideration of all the evidence in the case.

The jury charge also included the definition of beyond a reasonable doubt and instructed the jury as follows: "The prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the Defendant." The State argues that the jury charge was correct, but if there was error, it must be analyzed under the egregious harm standard since there was no objection to the charge and that the error does not rise to the level of egregious harm, citing *Hutch v. State*, 922 S.W.2d 166, 170-171 (Tex. Crim. App. 1996); *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986); and *Almanza*, 686 S.W.2d at 171.

In reviewing jury charge error, the appellate court must engage in a two-step process, first whether or not there was error, and second, whether or not sufficient harm was caused by the error to require reversal of the conviction. *Hutch*, 922 S.W.2d at 171. Since the error was not preserved by objection, the degree of harm necessary for reversal must be egregious. *See id.*; *Almanza*, 686 S.W.2d at 171. In *Almanza*, the Court of Criminal Appeals stated that errors which result in egregious harm are those which affect "the very basis of the case," deprive the defendant of a "valuable right," or "vitally affect a defensive theory." 686 S.W.2d at 172. In conducting a harm analysis, the Court of Criminal Appeals in *Hutch* explained that the following four factors must be considered: "1) the charge itself; 2) the state of the evidence including contested issues and the weight of the probative evidence; 3) arguments of counsel; and, 4) any other relevant information revealed by the record of the trial as a whole." *See*

Hutch, 922 S.W.2d at 171; TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981).

We point out that the court's charge here instructed the jury in the exact language used repeatedly in case law. *See Cabrera v. State*, 959 S.W.2d 692, 698 (Tex. App.—Fort Worth 1998, pet. ref'd). Assuming without deciding that the language in the court's charge constituted error, in order to determine whether the error was egregious, we look first at the entire charge. *Hutch*, 922 S.W.2d at 170-174. As argued by the State, the jury charge correctly set forth repeatedly that Appellant was presumed innocent and only after the State proved beyond a reasonable doubt each and every element of the crime could the jury find Appellant guilty of the charge. The jury charge clearly instructed the jury on this point of law. The other factors listed in *Almanza* and its subsequent cases on the point do not apply to the alleged error in this jury charge, as the alleged error relates to standardized language and not to the particular facts and instructions of this case. *See and compare Ovalle v. State*, 13 S.W.3d 774 (Tex. Crim. App. 2000).

Appellant's second point of error is overruled.

JURY ARGUMENT

In his third point, appellant complains of several jury arguments of the prosecutor during the guilt/innocence phase of the trial and during the punishment phase of the trial.

First, appellant complains that the following argument was error: "I ask that for all of the children and all of the adults in Galveston County, especially the children." Appellant contends that the prosecutor was, in effect, telling the jury that the people of Galveston wanted appellant convicted, citing *Cox v. State*, 247 S.W.2d 262 (Tex. Crim. App. 1951).

Appellant also states that the prosecutor made the following statement during closing argument during the guilt/innocence phase of the trial: "I ask that you find this sexual predator guilty of indecency with a child." Appellant correctly states that it is not proper for the prosecutor to refer to a defendant by any name other than his given name or nickname and it

is not proper to refer to the defendant by a generic or derogatory term designed to subject the defendant to personal abuse or suggest that he is "less than human," citing *Duran v. State*, 356 S.W.2d937 (Tex. Crim. App. 1962); *Marx v. State*, 150 S.W.2d 1014 (Tex. Crim. App. 1941); and *Jupe v. State*, 217 S.W. 1041 (Tex. Crim. App. 1920).

Third, Appellant complains that during the punishment phase of the trial, the prosecutor made the following statements:

> I ask you to consider the children of Galveston County, all the children in Galveston County, and the damage that this defendant has brought on our community . . .
>
> And I ask that you give what you think is fair — what you think is fair — what you think is fair to punish the behavior and to send a message that will hopefully end the suffering of the family in this case, that will end the suffering of the community in this case . . .
>
> I ask that you carefully consider and look at all the damage brought on the community by this defendant, by his choices.
>
> But imagine a hypothetical situation, which I think is very, very likely. If you deem in the best interest of the community an appropriate punishment for this case, for this defendant, this sex offender, this predator, this child molester to be walking our streets, I'll respect that. But the next time a little girl is missing in Galveston County and she turns up dead, raped and molested, horribly disfigured, body is not found for months – the next time a child is missing and found and this defendant is implicated and his probation is revoked, can you imagine the reaction of the parents of that child? Well, he was convicted of indecency with a child against R. F.; but the jury gave him probation. That's a horrible, horrible possibility . . .
>
> Where is the evil that needs to be punished? Right there (indicating). There. That's the evil, ladies and gentlemen.

The Court of Criminal Appeals has stated that it is well established that proper jury argument must fall within one of the following categories: (1) summary of the evidence; (2) reasonable deductions from the evidence; (3) in response to argument of opposing counsel; and (4) plea for law enforcement. *See Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990); *Madden v. State*, 721 S.W.2d 859, 862 (Tex. Crim. App. 1986); *Alejandro v. State*,

493 S.W.2d 230 (Tex. Crim. App. 1973). Here, however, there was no objection made at the time of the arguments complained of during the guilt/innocence phase of the trial or at the time of the arguments complained of during the punishment phase of the trial. As pointed out by the State, the failure to object to impermissible jury argument waives any error on appeal. *See Bowman v. State*, 782 S.W.2d 933, 936 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd); *Compos v. State*, 946 S.W.2d 414, 416 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (opinion on rehearing).

The Rules of Appellate Procedure state:

> 33.1 preservation; how shown.
>
> (a) in general. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1.) The complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A.) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context;
>
> (B.) complied with the requirements of the Texas Rules of . . . Criminal Evidence or the Texas Rules of . . . Appellate Procedure; and
>
> (2.) The trial court:
>
> (A.) ruled on the request, objection or motion, either expressly or implicitly; or . . . .
>
> (B.) refused to rule . . . and the complaining party objected to the refusal . . .

TEX. R. APP. P. 33.1.

The appellant, however, argues that an exception to the waiver rule exists when the

State's argument is so egregiously prejudicial that no instruction to disregard could possibly cure the harm. *See Bowman*, 782 S.W.2d at 936. The State cites *Cook v. State*, 741 S.W.2d 928, 939 (Tex. Crim. App.1987), *judgment vacated on other grounds by Cook v. Texas*, 488 U.S. 807 (1988) where the Court of Criminal Appeals held that absent the appellant pursuing an objection to an adverse ruling nothing is presented for review.

In *Romo v. State*, 631 S.W.2d 504, 505 (Tex. Crim. App. 1982) and in *Montoya v. State*, 744 S.W.2d 15 (Tex. Crim. App. 1987), the Court of Criminal Appeals held that a defendant may complain for the first time on appeal about an unobjected-to erroneous jury argument that could not have been cured by an instruction to disregard. However, in *Cockrell v. State*, 933 S.W.2d 73 (Tex. Crim. App. 1996), the Court overruled *Romo* and *Montoya*, holding that those decisions were questionable since the enactment of Rule 52 of the Texas Rules of Appellate Procedure (now Rule 33.1 and the Court's decision in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App.1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262, 265 (Tex. Crim. App. 1997)). The Court in *Cockrell* held that a defendant's failure to object to a jury argument or a defendant's failure to pursue an adverse ruling of his objection to a jury argument forfeits his right to complain about the argument on appeal explicitly overruling *Montoya* and *Romo*. *Cockrell*, 933 S.W.2d at 89. The Court held that this rule is applicable even though an instruction to disregard could not have cured an erroneous jury argument. *See Compos v. State*, 946 S.W.2d at 416. Accordingly, nothing is presented for review.

Even if the exception argued by the appellant was still valid, the arguments by counsel for the State at the guilt phase and at the punishment phase of the trial were not so extreme or manifestly improper, as to be egregious. *See Gaddis v. State*, 753 S.W.2d 396 (Tex. Crim. App. 1998). Appellant's contention, relying on *Cox v. State*, 157 Tex. Crim. 134, 247 S.W.2d 262 (Tex. Crim. App. 1952), that counsel for the State argued that the people are asking the jury to convict the defendant, is incorrect and appellant's reliance on *Cox* is misplaced. The prosecutor never said that the people of Galveston County are asking the jury to convict. The

prosecutor's argument was a plea for law enforcement for the safety of the families in Galveston County. The case at bar is distinguishable from *Cox*. *See Bolding v. State*, 493 S.W.2d 181, 185 (Tex. Crim. App. 1973); *Luna v. State*, 461 S.W.2d 600 (Tex. Crim. App. 1970); *Smith v. State*, 418 S.W.2d 683 (Tex. Crim. App. 1967).

Appellant also argues that the statement by the prosecutor referring to appellant as a "sexual predator" is reversible error. *See Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977). In the *Burns* case, the prosecutor referred to the defendant as an "animal." *Id*. The evidence in that case showed that the appellant had brutally tortured and murdered a 58 year-old man. *Id*. The Court of Criminal Appeals in that case held that the term was not an improper deduction from the evidence. *Id*. The same is true here. The victims testified that the defendant had fondled them and had committed sodomy on one of them. *See Rocha v. State*, 16 S.W. 3d (Tex. Crim. App. 2000); *Norris v. State*, 902 S.W.2d 428 (Tex. Crim. App. 1995); *Sterling v. State*, 830 S.W.2d 114 (Tex. Crim. App. 1992).

Appellant's third point of error is overruled.

There being no reversible error, the judgment of the trial court is affirmed.

/s/ Frank Maloney
Justice

Judgment rendered and Opinion filed August 10, 2000.
Panel consists of Justices Amidei, Anderson, and Maloney.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Frank Maloney sitting by assignment.