

**Opinion of November 4, 1999, Withdrawn and Substituted Opinion filed December 16, 1999.**



**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-98-00328-CR**

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**JOSE ANGEL GARCIA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 178<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 739,471**

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**SUBSTITUTED OPINION**

The opinion issued in this case on November 4, 1999, is withdrawn, and the following opinion is issued in its place.

Jose Angel Garcia appeals a conviction for aggravated robbery on the grounds that: (1) the trial court failed to include a definition of reasonable doubt in the jury charge on punishment; (2) the trial court erred in instructing the jury at punishment that his sentence could be reduced through the award of good time; and (3) the jury charge requirement in article 37.07 of the Texas Code of Criminal Procedure is unconstitutional. We affirm.

### **Reasonable Doubt Instruction**

Appellant was charged with the aggravated robbery of a pawn shop, entered a guilty plea, was found guilty by a jury, and was sentenced by the jury to seventeen years confinement. During the punishment hearing, the State called a witness who testified that appellant had previously robbed another pawn shop at gunpoint. The jury instructions on punishment did not instruct the jury that it could not consider the testimony of the extraneous offense unless it found beyond a reasonable doubt that appellant had committed it. Nor did appellant request such an instruction. Appellant's first point of error argues that the failure to include such a reasonable doubt instruction allowed the jury to consider evidence of the extraneous offense without determining that it was proven beyond a reasonable doubt.

A reasonable doubt instruction must be included in the jury charge at the punishment phase of trial *when requested*. See *Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996). However, a reasonable doubt instruction is not required to be given at the punishment phase absent a request. See *Fields v. State*, No. 792-98, 1999 WL 715017, at \*1 (Tex. Crim. App. Sept. 15, 1999). Because appellant made no request in his case for a reasonable doubt instruction in the punishment phase, this point of error presents nothing for our review and is overruled.<sup>1</sup>

### **Parole Instruction**

Appellant's second point of error argues that the trial court egregiously erred in instructing the jury at punishment that his sentence might be reduced through the award of good conduct time because a person convicted of aggravated robbery is not eligible for such a reduction in either his full sentence or the time in which he could become eligible for

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<sup>1</sup> In the present case, the State elicited testimony from appellant during the punishment phase concerning his involvement in the extraneous offense. In that testimony, appellant readily admitted robbing the other pawn shop and discussed the property that he had stolen. Appellant's attorney not only did not object to this testimony, he openly discussed appellant's participation in that pawn shop robbery, without denial, during his closing argument. Because both appellant and his attorney freely admitted that appellant committed the extraneous offense, we also conclude beyond a reasonable doubt that the failure to instruct the jury on reasonable doubt did not contribute to appellant's punishment.

parole. His third point of error similarly argues that section 37.07 of the Texas Code of Criminal Procedure violates his constitutional rights to due course of law and due process by requiring such an instruction because it did not apply to his offense. *See Jiminez v. State*, 992 S.W.2d 633, 638-39 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999, pet. granted) (holding 37.07 unconstitutional but finding that unobjected to charge thereunder did not amount to egregious harm).

The jury charge at the punishment phase in this case contained the following language:

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.

\* \* \* \*

It cannot accurately be predicted how . . . 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 . . . authorities.

You may consider the existence of . . . good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to . . . this particular defendant.

As appellant's brief acknowledges, this instruction was mandated by article 37.07. *See* TEX. CODE CRIM. P. ANN. art. 37.07 § (4)(a) (Vernon 1998). Therefore, we have no basis to conclude that the trial court erred at all, let alone egregiously, by complying with that statutory requirement. *See Boston v. State*, 965 S.W.2d 546, 549-50 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1997, pet. ref'd).

With regard to appellant's constitutional challenge, to be preserved for appellate review, a complaint must generally be presented to the trial court by a timely request, objection, or motion, stating the specific grounds for the ruling sought. *See* TEX. R. APP. P. 33.1(a). In this case, appellant has cited and we have found no portion of the record at which

he raised a constitutional challenge to article 37.07. Therefore, this contention presents nothing for our review.<sup>2</sup> Accordingly, appellant's second and third points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman  
Justice

Judgment rendered and Opinion filed December 16, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig (J. Amidei not participating).

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

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<sup>2</sup> See *Ladd v. State*, 3 S.W.3d 547, \_\_\_(Tex. Crim. App. 1999) (overruling appellant's constitutional challenges to a jury charge instruction on the law of parties because the constitutional arguments had not been raised in the trial court and because the *Almanza* egregious harm standard does not apply to charge errors implicating state or federal constitutional rights).