Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00164-CR

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LANCE KENNEDY BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 31,262

O P I N I O N

Lance Kennedy Brown appeals a conviction for the felony offense of escape on the ground that the trial court erred in instructing the jury on an issue that was not raised during trial. We affirm.

Background

Appellant left prison without authorization while serving a sentence for murder. A jury found him guilty of escape and assessed punishment at 20 years confinement.

Preservation of Error

Appellant's sole point of error argues that the trial court erred in instructing the jury in the abstract portion of the charge on guilt or innocence that "it is no defense to prosecution that the custody, if any, was unlawful" (the "instruction") when no evidence at trial challenged the lawfulness of custody.

To preserve jury charge error, a defendant must object in writing, specifying the grounds,[1] and obtain an adverse ruling. *See Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996). In the present case, the only discussion of the instruction during the charge conference was as follows:

> [DEFENSE COUNSEL]: The second page, about half way down, there's one sentence, "It is no defense to prosecution that the custody, if any, was lawful;" I don't see the need for this anywhere. I know sometimes you have this in this type of Charge, but I don't see the need for this anywhere since I don't believe there's been any issue or that there will be any issue challenging his custody, so I don't think it adds anything to the case. I don't see anything in the offense that authorizes this wording.
>
> [PROSECUTOR]: 38.08 says, "It is no defense to prosecution;" under 36.06, "That the custody was unlawful." That's where I pulled that from.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: We'll leave that in then. What else?

Appellant never obtained an adverse ruling on his request to remove this sentence from the jury charge, but, if anything, acquiesced in including it after the State cited section 38.08[2] as authority for doing so. Therefore this point of error presents nothing for our review.[3]

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1 *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1999).

2 *See* TEX. PEN. CODE ANN. § 38.08 (Vernon 1994).

3 Appellant does not contend that the complained of instruction resulted in egregious harm.

Charge Error

In addition, when an abstract charge is erroneously given on a theory of law that was not raised by the evidence, but the theory is not applied to the facts of the case in the abstract or application paragraph, then the overruling of an objection to the abstract charge is not error. *See Hughes v. State*, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994). In this case, the complained of abstract instruction is a correct statement of the law. *See* TEX. PEN. CODE ANN. § 38.08 (Vernon 1994). More importantly, there was no statement in the abstract or application paragraph applying the instruction to the facts of this case. Therefore, even if an adverse ruling had been obtained, the instruction would not have been error. Accordingly, appellant's point of error is overruled, and the judgment of the trial court is affirmed.

_____
Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Chief Justice Murphy and Justices Edelman and Frost.

Do not publish — TEX. R. APP. P. 47.3(b).