COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-00-050-CR

BILLY JAMES THOMAS, JR. A/K/A BILLY JAMES THOMAS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY

OPINION

Appellant Billy James Thomas, Jr. pleaded guilty to the offense of aggravated assault causing serious bodily injury. After finding that Appellant used a deadly weapon and because of a prior felony, the jury assessed an enhanced punishment of seventy-five years' confinement. In a single point on appeal, Appellant contends the trial court erred in including an instruction regarding parole and good conduct credit in the jury charge when Appellant was not eligible to receive good conduct credit for his offense. We affirm.

I. BACKGROUND

Appellant and Katy Neely dated for over a year. After Katy ended their relationship, Appellant was upset and threatened to kill himself. After the breakup, Appellant continued to pursue Katy. On one occassion, Appellant was sitting in Katy's car when she got off of work at Blockbuster Video. Appellant and Katy talked about their relationship, and Katy drove Appellant home. Appellant then asked Katy if she would come by and see him after she got off work the next day. Katy agreed.

The following day, Appellant called Katy's house to make sure Katy was still going to come by and see him after work. However, Appellant went to Katy's place of employment and was waiting for Katy when she got off work that afternoon. Appellant told Katy that he had rented a motel room and said that there were some things he wanted to show her. Katy drove Appellant to the motel and went with him to the room. Once in the room, Appellant showed Katy a photo album with pictures of the two of them and a note Katy had written him during the relationship. He asked Katy if those things meant anything to her. Katy said that they did "at one time, but they mean something different now."

Katy said that she had to go home, at which point, Appellant grabbed a razor blade and slit Katy's throat from behind. Katy fell to the floor. Appellant got on top of Katy, covering her mouth and holding her arm to the ground, and

asked if Katy would lay on the bed with him. Katy nodded, and Appellant let her up. Appellant then slit his own wrists and threw the razor blade to the ground. Katy grabbed the razor blade and left the room. At the same time, Jeffrey Swanson was walking toward his truck from his room when he noticed Katy walking toward him with blood under her chin. Swanson and Katy went to his room where he called 9-1-1. While Katy was waiting for Swanson to call 9-1-1, she observed Appellant get into her car and drive off. Appellant was later apprehended slumped over the steering wheel of Katy's car.

II. JURY CHARGE ERROR

In his sole point on appeal, Appellant complains that the trial court's charge to the jury concerning the possibility of parole and good conduct time contained an incorrect statement of the law in violation of article 36.14 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 2001). The trial court's charge to the jury included the following instruction:

> 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.

Before filing the charge with the clerk, the trial court asked both sides if they had any objections to the charge in its current form. Appellant replied, "No, Your Honor." The State argues that Appellant thereby waived any objection to the charge and presents nothing for review. We agree. *See Cedillo v. State,* 33 S.W.3d 366, 368 (Tex. App.—Fort Worth 2000, no pet. h.) (holding that Appellant waived any objection to the jury charge by affirmatively stating he had no objection to the charge); *Ly v. State*, 943 S.W.2d 218, 221 (Tex.

App.—Houston [1st Dist.] 1997, pet. ref'd) (holding that a defendant who affirmatively states no objection to a jury charge at trial may not challenge on appeal any error in that jury charge.). Therefore, we hold Appellant waived any error in the jury charge by affirmatively stating that he had no objection.

However, had Appellant preserved this error for appeal, this court has already rejected his argument. *See Cagle v. State*, 23 S.W.3d 590, 593-94 (Tex. App.—Fort Worth 2000, pet. filed) (op. on reh'g). Here, the trial court included in its charge the mandatory language of article 37.07, section 4(a) of the Texas Code of Criminal Procedure, informing the jury of the existence and mechanics of parole law and good conduct time. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a). Although the instruction tracked the statutory language of article 37.07, Appellant argues that the instruction was incorrect and misleading to the jury because he was ineligible to earn good conduct time toward mandatory supervision release due to the jury's affirmative finding that he used or exhibited a deadly weapon. In *Cagle*, we determined that inclusion of the mandatory charge under these same or similar circumstances was not error. *See id.* We overrule Appellant's point on appeal.

III. CONCLUSION

Having overruled Appellant's point on appeal, we affirm the trial court's judgment.

SAM J. DAY
JUSTICE

PANEL A: CAYCE, C.J.; DAY and DAUPHINOT, JJ.

DAUPHINOT, J. filed a dissenting opinion.

PUBLISH

[DELIVERED FEBRUARY 8, 2001]

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THE STATE OF TEXAS — STATE

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DISSENTING OPINION

I respectfully dissent to the majority's *Almanza* analysis for the reasons set out by Justice Richards in his dissenting opinion on rehearing in *Cedillo v. State*.[1] In *Cedillo*, we held that a defendant who affirmatively states that he has "no objection" to the jury charge waives any error in the charge on appeal.[2]

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[1]*See Cedillo v. State*, 33 S.W.3d 366, 368-69 (Tex. App.—Fort Worth 2001) (Richards, J., dissenting op. on reh'g).

[2]*Cedillo v. State*, 33 S.W.3d 366, 367-68 (Tex. App.—Fort Worth 2000, no pet. h.).

Justice Richards disagreed with this conclusion and filed a dissenting opinion, stating in pertinent part:

> On reflection, I believe the majority opinion is incorrect in holding that jury instruction error is waived when defense counsel states he or she has "no objection" to the charge. *Almanza*[3] requires a defendant to climb the high hurdle of "egregious harm" in such cases, but the error itself is not considered waived. The court of criminal appeals has continued to use the *Almanza* test for unobjected-to error without ever stating that waiver by affirmative approval of the jury charge negates the need for egregious harm analysis on appeal. *See, e.g., Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) ("Because appellant did not preserve the jury charge error, resolution of the instant case requires an egregious harm analysis."). The purpose of the egregious harm test for unobjected-to error is to [ensure] review of jury instruction errors not caught by defense counsel or the trial court at the time of trial. As a near-universal rule, the trial court always inquires whether the defense has any objections to the charge. *Almanza's* egregious harm test is used in those instances where counsel did not recognize the error and therefore failed to make an appropriate objection.
>
> If the majority opinion stands, it is likely there will never again be a case decided in the Court of Appeals for the Second District of Texas in which *Almanza's* test for unobjected-to error is applied. Instead, those cases will simply be disposed of on grounds that "nothing is presented for review" because defense counsel either: (1) acquiesced to the error by responding "no objection" to the proposed instructions; or (2) lodged an objection to an unrelated portion of the instruction and then responded "no other objections." In essence, the *Almanza* test for unobjected-to error will be completely swallowed up by the rule announced in the majority decision.[4]

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[3] *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (op. on reh'g).

[4] *Cedillo v. State*, 33 S.W.3d at 368-69.

When the provisions of articles 36.14, 36.15, and 36.16 of the code of criminal procedure are read in harmony, a trial judge is required to inquire of any objections to the charge before reading the final charge to the jury.[5] "No objection" means "no objection." When there is "no objection" to the jury charge, the egregious harm standard is appropriate.[6] I believe the majority has confused invited charge error with the *Almanza* "no objection" paradigm. If a defendant can waive charge error by stating that there is no objection, the portion of *Almanza* addressing unobjected-to error is rendered either a nullity or nonsensical.

I do not address the propriety of the parole charge, but limit my dissent to the majority's deviation from the clear and unambiguous *Almanza* test.

LEE ANN DAUPHINOT
JUSTICE

PUBLISH
[DELIVERED FEBRUARY 8, 2001]

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[5]TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.15, 36.16 (Vernon 1981 & Supp. 2001).

[6]*See Webber v. State*, 29 S.W.3d 226, 232-33 (Tex. App.—Houston [14th Dist.] 2000, no pet.).