In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00253-CR

MARK DAVID IVERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 4th District Court
Rusk County, Texas
Trial Court No. CR18-367

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

After a Rusk County jury found Mark David Ivers guilty of harassing a public servant, the trial court sentenced him to eight years in prison. In a single point of error, Ivers contends that the trial court erred in instructing the jury regarding parole. We affirm the trial court's judgment because the trial court's error did not cause Ivers egregious harm.

In August 2018, Ladon Coleman saw a man, later identified as Ivers, lying in the median at the intersection of Highway 259 North and Highway 64 West. Worried for the man's safety, Coleman called 9-1-1. Dispatched to check on the man's welfare, Deputy Chief Randall Hudman of the Henderson Police Department found Ivers still lying in the median. When Hudson and the other two officers on the scene, Officer Jeremy Trimble and Sergeant April LaFarr, tried to wake Ivers up, they noticed several alcohol containers nearby as well as Ivers's slurred speech, an alcohol odor coming from him, his staggering while trying to stand, and his glassy and bloodshot eyes.

A pat-down search found nothing in Ivers's pockets,[1] but he failed a horizontal gaze nystagmus (HGN) test. Ivers repeatedly asked the officers to leave him alone, but the officers, having determined that Ivers was intoxicated, were worried about the safety of Ivers and of individuals that might drive near him. When the officers tried to handcuff Ivers incident to arrest, he jerked away from them and tried to flee. Trimble restrained Ivers for a moment, and Hudman handcuffed one of Ivers's wrists before he began struggling again. After a further struggle, during which LaFarr's body cam was knocked off, the officers managed to fully handcuff Ivers. Hudman

[1]Ivers consented to the pat-down search.

testified that, while the officers were walking Ivers to the patrol car, he "was trying to spit," and Hudman assumed he was trying to spit on them. LaFarr testified that, as she drove Ivers away from the scene in her patrol car, Ivers spit on her. After that, she fully closed the plexiglass window between the front and rear seats of the car, but Ivers proceeded to spit onto the window and threaten her. That series of actions resulted in the charge for harassment of a public servant.[2]

During the guilt/innocence phase of the trial, Coleman, Hudman, Trimble, and LaFarr testified for the State, and the body camera recordings from Hudman and LaFarr were played for the jury. The State then rested. Ivers called no witnesses before resting.

Ivers's one point of error contends that the trial court erred in submitting an incorrect parole instruction to the jury during the punishment phase of the trial. Because Ivers did not object to the charge and there was no egregious error, we will overrule this contention.

We employ a two-step process in our review of alleged jury-charge error. *See Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). "Initially, we determine whether error occurred and then evaluate whether sufficient harm resulted from the error to require reversal." *Wilson v. State*, 391 S.W.3d 131, 138 (Tex. App.—Texarkana 2012, no pet.) (citing *Abdnor*, 871 S.W.2d at 731–32). We evaluate for harm only if we find that error occurred.

"[T]he jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby." *Murrieta v. State*, 578 S.W.3d 552, 554 (Tex. App.—Texarkana

[2]Harassment of a public servant is included in the assaultive offenses chapter of the Texas Penal Code. A person commits this offense if, with the intent to assault, he "causes another person the actor knows to be a public servant to contact the . . . saliva . . . of the actor . . . while the public servant is lawfully discharging an official duty or in retaliation or on account of an exercise of the public servant's official power or performance of an official duty." TEX. PENAL CODE ANN. § 22.11(a)(3). Under Section 22.01(a)(3), a person commits assault if he "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." TEX. PENAL CODE ANN. § 22.01(a)(3) (Supp.).

2019, no pet.) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.13). "A trial court must submit a charge setting forth the 'law applicable to the case.'" *Id*. (quoting *Lee v. State*, 415 S.W.3d 915, 917 (Tex. App.—Texarkana 2013, pet. ref'd) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14)). "The purpose of the jury charge . . . is to inform the jury of the applicable law and guide them in its application. It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and prevent confusion." *Id*. (quoting *Lee*, 415 S.W.3d at 917; *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007)).

In 2019, the Texas Legislature amended Article 37.07 of the Texas Code of Criminal Procedure, which sets forth the instructions to be given to the jury regarding the effect of parole on any sentence assessed. *See* TEX CODE CRIM. PROC. ANN. art. 37.07 (Supp.). Ivers contends that the trial court improperly charged the jury under the pre-amendment provisions of Article 37.07, Section 4, of the Texas Code of Criminal Procedure.[3]

Section 4 of Article 37.07 of "[t]he Texas Code of Criminal Procedure 'specifically sets out three lengthy, alternative jury charges concerning the parole law; and those are to be chosen based on a very exacting and at least potentially confusing set of conditions.'" *Murrieta*, 578 S.W.3d at 554 (quoting *Stewart v. State*, 293 S.W.3d 853, 855 (Tex. App.—Texarkana 2009, pet. ref'd)) (citing TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a)–(c)). "Depending on the offense of which a defendant has been convicted, whether his . . . sentence is to be enhanced, and whether a

[3]Specifically, Ivers contends that the trial court improperly instructed the jury under the pre-amendment provisions of Section 4(b). However, it is apparent that the trial court improperly instructed the jury under the pre-amendment provisions of Section 4(c).

deadly-weapon finding has been made . . . the trial court is to select which one of the three alternatives will be given to the jury." *Id*. (citing *Stewart*, 293 S.W.3d at 855–56).

Here, the trial court gave the following instruction regarding the application of parole law:

> 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 actual timer [sic] served equals one-quarter of the sentenced imposed, without consideration of any good time [sic] he may earn. 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 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.

The trial court's instruction tracks the pre-amendment language of Article 37.07, Section 4(c). *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 2.08, 2015 Tex. Gen. Laws 2321, 2366–68 (amended 2019) (current version at TEX. CODE CRIM. PROC. art. 37.07, § 4(c)).[4] The effective date

[4]The 2019 amendment made three relevant changes to Article 37.07, Section 4(c) of the Texas Code of Criminal Procedure. First, the sentence, "The length of time for which a defendant is imprisoned may be reduced by the award

of the 2019 amendment was September 1, 2019, and the proceedings in this case took place in November 2019. Because Ivers was sentenced after the 2019 amendment's effective date, there was error in instructing the jury regarding parole law using Section 4(c)'s pre-amendment language. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 2.08, 2015 Tex. Gen. Laws 2321, 2366–68 (amended 2019). Having found error, we must determine if the error caused sufficient harm to require reversal.

"The level of harm necessary to require reversal due to jury charge error is dependent upon whether the appellant properly objected to the error." *Murrieta*, 578 S.W.3d at 555 (citing *Abdnor*, 871 S.W.2d at 732). Here, because the defendant did not object to the charge, we will not reverse the judgment "unless the record shows the error resulted in egregious harm, *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g), such that he did not receive a fair and impartial trial." *Id.* (citing *Almanza*, 686 S.W.2d at 171; *Loun v. State*, 273 S.W.3d 406, 416 (Tex. App.—Texarkana 2008, no pet.)). "Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Id.* (quoting *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007)). "In making this determination, we review 'the entire jury charge, the state of the evidence, the argument of counsel, and any other relevant information in the record as a whole.'" *Id.* (quoting *Villarreal v. State*, 205 S.W.3d 103, 106 (Tex. App.—Texarkana 2006, pet. dism'd, untimely filed) (citing *Almanza*, 686 S.W.2d at 171)).

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of parole" was inserted before the original first paragraph. Second, the phrase "time off the period of incarceration imposed" in the first paragraph was deleted and replaced with "early parole eligibility." Third, the second paragraph, consisting of one sentence, was deleted. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 2.08, 2015 Tex. Gen. Laws 2321, 2366–68 (amended 2019).

"Direct evidence of harm is not required to establish egregious harm." *Id.* (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)).

The jury was instructed that it was "not to consider the manner in which parole law may be applied" to Ivers. Absent evidence or indications to the contrary, we presume that the jury followed this instruction. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002). Combined with other factors, a curative instruction may cure any error. *See Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006). There is no jury note or other evidence that the jury failed to follow the court's instruction or considered parole law in their deliberations.

Harassment of a public servant is a third-degree felony with a punishment range between two and ten years' imprisonment and a fine not to exceed $10,000.00. TEX. PENAL CODE ANN. §§ 12.34; 22.11(b). Despite the State seeking a seven-year sentence, the jury assessed an eight-year sentence, and the evidence on punishment supports that near-maximum sentence. In addition to viewing the body camera footage of Ivers's actions, the jury heard evidence that Ivers had a lengthy and serious criminal history, including misdemeanor theft by check, misdemeanor driving while intoxicated, felony assault with a deadly weapon, felony credit card abuse, felony illegal possession of a weapon, and felony unauthorized use of a motor vehicle.

Neither Ivers nor the State raised the issue of parole during argument. Other than the charge, the only mention of parole during the proceedings consisted of Ivers admitting on direct examination that he had previously served two years for a parole violation.

Ivers contends that the following three cases support his argument for a new trial on punishment. In *Villareal v. State*, the trial court entirely omitted the parole instruction from the

punishment charge. *Villareal v. State*, 205 S.W.3d 103, 105 (Tex. App.—Texarkana 2006, pet. ref'd). This Court found that the omission, alone, was not egregiously harmful but that because the jury sent a note requesting information about how many years the defendant would actually serve versus what they sentenced him to, the omission resulted in egregious harm. *Id.* at 105–07. However, the facts of this case are distinguishable from those of *Villareal* because, here, the trial court did not completely omit the parole instruction, and there is no indication that the jury considered parole evidence in their sentencing deliberations. *Id.* at 107.

In *Hill v. State*, this Court found egregious harm when the trial court instructed the jury that the defendant would be eligible for parole when his actual time served plus good-conduct time equaled one-half of the sentence imposed or thirty years, whichever was less, though, under the correct instruction, the defendant would not be eligible for parole until his actual time served equaled one-half of the sentence imposed, regardless of good-conduct time. *Hill v. State*, 30 S.W.3d 505, 507 (Tex. App.—Texarkana 2000, no pet.). The proper instruction in *Hill* differed sharply with the instruction given, while the differences between the given and proper instructions in this case are far less significant. *See id.* Furthermore, in *Murrieta*, this Court recognized that, under the rulings of the Texas Court of Criminal Appeals in *Ross v. State*, 133 S.W.3d 618 (Tex. Crim. App. 2004), and *Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App.2006), *Hill* is no longer good law. *Murrieta*, 578 S.W.3d at 558–59.

This Court's opinion in *Loun* does not support reversal in this case either. *See Loun*, 273 S.W.3d 406. We found reversible error when the trial court significantly modified the statutory parole instruction over Loun's objection. *Id.* at 414–18. Because Loun objected to the error, he had to show only that the error caused some harm, whereas here, Ivers failed to object to the trial

court's error, thereby having to show egregious harm, a much higher standard that is not met in this case. *Id*. at 417–18. Accordingly, the facts of *Loun* are distinguishable from those of this case.

Based on the foregoing, we conclude that the jury charge error did not cause Ivers egregious harm. Therefore, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: May 18, 2020
Date Decided: June 24, 2020

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