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

No. 06-19-00239-CR

RAFAEL GUERRA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 188th District Court
Gregg County, Texas
Trial Court No. 47786-A

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

MEMORANDUM OPINION

A Gregg County jury convicted Rafael Guerra of driving while intoxicated (DWI), with two or more prior DWI convictions,[1] and possession of a controlled substance, methamphetamine, in an amount of one gram or more, but less than four grams.[2] At the punishment hearing, Guerra pled not true to two felony enhancement allegations, but the jury found the enhancement allegations true and sentenced Guerra to ninety-nine years' imprisonment on each conviction. In this appeal,[3] Guerra appeals his DWI conviction and complains that the trial court erred (1) in giving an incorrect jury instruction on the application of parole and (2) in entering a written judgment that states that Guerra pled "true" to each of the felony enhancement allegations. Because we find that Guerra was not harmed by the trial court's jury instruction, we affirm the trial court's judgment. Nevertheless, we modify the judgment to reflect that Guerra pled "not true" to the two felony enhancement allegations.

I. Jury Charge Error

A. Standard of Review

"We employ a two-step process in our review of alleged jury charge error." *Murrieta v. State*, 578 S.W.3d 552, 554 (Tex. App.—Texarkana 2019, no pet.) (citing *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." *Id*. (quoting

[1]*See* TEX. PENAL CODE ANN. § 49.09(b)(2) (Supp.).

[2]*See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(c).

[3]Guerra appeals his conviction for possession of a controlled substance in our cause number 06-19-00240-CR.

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 only evaluate for harm 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." *Id*. (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)).

A. Analysis

1. Did the Trial Court Err?

"The 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.'" *Id.* 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) (Supp.)). "Depending on the offense of which a defendant has been convicted, whether his . . . sentence is to be enhanced, and whether a 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).

In his first issue, Guerra contends that the trial court gave an incorrect jury instruction on the application of parole, which he contends caused him egregious harm. Initially, we must determine whether the trial court's charge was erroneous. *Id.*

In 2019, the Texas Legislature amended Article 37.07, Section 4, subsections (a) through (c), of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a)–(c). Those amendments apply to any defendant sentenced on or after September 1, 2019. *See* Act of May 26, 2019, 86th Leg., R.S., ch. 260, 2019 Tex. Gen. Laws 1, 6. The parties agree that the instructions set forth in the 2019 amendments to Article 37.07, Section 4(b), apply to this case.[4]

Section 4(b) provides that the following instructions are to be given to the jury in the penalty phase of the trial:

> "The length of time for which a defendant is imprisoned may be reduced by the award of parole.
>
> "Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn early parole eligibility 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.
>
> "Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. 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 sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

[4]Guerra was sentenced on October 30, 2019.

> "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."

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b). While the trial court's instructions given in this case were not identical to the instructions set forth in Section 4(b), the instructions were substantially similar to those required by Section 4(b).[5]

At trial, Guerra did not object to the trial court's instructions. On appeal, Guerra does not identify the deviations from the instructions now required by Section 4(b) about which he is complaining. Guerra also does not explain how the instructions given by the trial court failed to "inform the jury of the law applicable to the case and guide them in its application" or how they confused or mislead the jury. *Murrieta*, 578 S.W.3d at 554.

Nevertheless, the Texas Court of Criminal Appeals, in considering whether the trial court erred in giving the jury instructions set forth in Article 37.07, Section 4(a), even though part of the instructions were not applicable to the defendant, held that "[t]he Texas Legislature enacted legislation that *requires* the trial judge to instruct the jury in the precise wording that the statute recites." *Luquis v. State*, 72 S.W.3d 355, 363 (Tex. Crim. App. 2002). Assuming, without deciding, that *Luquis* would require us to find that the trial court erred, we find that Guerra was not egregiously harmed by any such error.

[5]We note that while the 2019 amendments to Section 4 made substantial changes to the instructions required by Section 4(a), the changes made to Section 4(b) were relatively minor. *See* Act of May 26, 2019, 86th Leg., R.S., ch. 260, 2019 Tex. Gen. Laws 1, 1–4.

2. Did Guerra Suffer Egregious Harm?

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)). "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 instructions given by the trial court deviated from the instructions required by Section 4(b) in two ways. First, the language required by the first paragraph of Section 4(b) states, "The length of time for which a defendant is imprisoned *may* be reduced by the award of parole." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b).[6] The trial court's instruction read: "*It is also possible that* the length of time for which a defendant is imprisoned *might* be reduced by the award of

[6]The variance between the Section 4(b) instructions and those given by the trial court are shown by italics.

parole." Although phrased in a slightly different manner, both instructions clearly inform the jury of the possibility that the award of parole may reduce the length of the defendant's imprisonment.

Second, the second paragraph of Section 4(b) mandates the following instruction:

> "Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn *early parole eligibility* 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."

Id. The trial court's instruction read:

> "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."

Viewed in isolation, it may be arguable that "early parole eligibility" differs from "time off the period of incarceration imposed."

Nevertheless, the purpose of this paragraph and those following it appears to be to inform the jury of the possibility that the defendant may earn good time credit, as well as have good time credit taken away, and to explain the effect of good time credit on the length of his imprisonment. In the third paragraph, both the trial court's instructions and Section 4(b) explain that Guerra "will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted." Thus, both the Section 4(b) instruction and the trial court's slightly different instruction inform the jury that if the defendant earns good time credit, he may become eligible for

parole earlier than if he has not earned good time credit, and that if he is awarded parole, he may have the length of his imprisonment reduced. When viewed in context of the entire instruction on parole, it is unlikely that the jury would have been confused or mislead by the trial court's deviation from the Section 4(b) instruction.

In addition, the trial court instructed the jury that although it "may consider the existence of the parole law and good time credit," it was "not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant." We presume the jury followed the instructions given in the charge, unless the appellant points out evidence in the record that the jury failed to do so. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *see Murrieta*, 578 S.W.3d at 556. Guerra has pointed to no evidence that the jury failed to follow this instruction. Further, the jury did not send the trial court any notes inquiring about parole, good time credit, or their effect on the length of Guerra's imprisonment. Nothing else in the record indicates that the jury failed to follow the trial court's instructions. *See Murrieta*, 578 S.W.3d at 556.

There was also evidence supporting the jury's sentence assessment. Texas Department of Public Safety Trooper Dennis Redden testified that at ten o'clock in the morning on May 6, 2018, he observed Guerra's vehicle nearly crash into another vehicle, then speed around the vehicle and cut in front of it in an unsafe manner. After Redden began following him, Guerra increased his speed to almost twenty miles per hour above the posted speed limit of forty-five miles per hour while weaving through traffic. Redden initiated a traffic stop and began a DWI investigation when he smelled a strong odor of alcohol. After administering field sobriety tests, Redden arrested

Guerra.[7] Guerra's blood sample showed that he had a blood alcohol concentration of 0.258 grams of alcohol per 100/ml of blood. The evidence also showed that at the time of his arrest, Guerra was in possession of 2.43 grams of methamphetamine.

During the guilt/innocence stage, the State also established that Guerra had previously been convicted two times of DWI, on December 2, 1997, and on February 26, 1999. In the punishment stage, the State established that Guerra had also been convicted two times of felony DWI, on August 9, 1999, for which he was sentenced to five years' imprisonment, and on October 24, 2006, for which he was sentenced to twenty years' imprisonment. Guerra also testified and denied that he had committed the prior DWI's and claimed that the paperwork had been falsified. He did not express any remorse for his actions.

The evidence showed that this was Guerra's fifth DWI conviction, that he had been convicted of felony DWI twice before, that he had been sentenced to prison twice for DWI, that he still drove while under the influence of alcohol, and that he was in possession of a significant amount of methamphetamine. Based on this evidence, the jury could have concluded that Guerra was unlikely to stop drinking and driving and that he possessed, if not used, narcotics. It could also have considered that in this instance, Guerra drove recklessly at a high rate of speed on a heavily travelled stretch of highway at ten o'clock in the morning with a blood alcohol concentration that was in excess of three times the amount defined as intoxication. *See* TEX. PENAL CODE ANN. § 49.01(2)(B). Combined with Guerra's lack of remorse, the jury could have concluded that a lengthy sentence was the only way to protect the public from Guerra's reckless behavior.

[7]The jury also saw a video recording of Redden's pursuit of Guerra, the field sobriety tests, and his arrest.

Finally, neither the State nor Guerra's counsel mentioned parole or good conduct time in their arguments. Rather, Guerra's counsel sought a minimum sentence, and the State argued for the maximum.

Although Guerra received a maximum sentence of ninety-nine years' imprisonment, the trial court's instruction to the jury to not consider the award or forfeiture of good conduct time, the strong evidence in support of the sentence, and the lack of any argument regarding parole or good conduct time all mitigate against a finding of egregious harm. *See Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006). Consequently, we find that Guerra did not suffer egregious harm from any error in the trial court's jury charge. We overrule Guerra's first error.

II. The Judgment Must be Modified

Guerra also asserts that the written judgment entered by the trial court should be corrected to reflect that he pled not true to the two punishment enhancement paragraphs. We agree.

We have the authority to modify the judgment to make the record speak the truth when it has been brought to our attention by any source. TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). "Our authority to reform incorrect judgments is not dependent on the request of any party, nor does it turn on a question of whether a party has or has not objected in trial court; we may act sua sponte and may have a duty to do so." *Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.) (citing *Asberry v. State*, 813 S.W.2d 526, 531 (Tex. App.—Dallas 1991, pet. ref'd)); *see French*, 830 S.W.2d at 609.

Under the sections entitled "Plea to 1st Enhancement Paragraph" and "Plea to 2nd Enhancement Paragraph," the trial court's written judgment reflects the pleas as "TRUE." However, the record shows that at the punishment hearing, Guerra pled "not true" to each of the

enhancement paragraphs. Therefore, we will modify the judgment to reflect Guerra's pleas. We sustain Guerra's second issue.

III. Disposition

We modify the sections entitled "Plea to 1st Enhancement Paragraph" and "Plea to 2nd Enhancement Paragraph" in the trial court's judgment by changing "TRUE" to "NOT TRUE" in each section. For the reasons stated, we affirm the trial court's judgment, as modified.

Ralph K. Burgess
Justice

Date Submitted: July 2, 2020
Date Decided: July 6, 2020

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