Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00652-CR

BILL MARCUS TUTOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Burleson County, Texas
Trial Court Cause No. 11,858

O P I N I O N

Appellant, Bill Marcus Tutor, was charged with aggravated sexual assault of C.R.B., a six-year-old girl, and of R.A.N., a six-year-old boy. The indictment alleged he had made oral contact with the sex organ of each child. The jury found him guilty and assessed thirty years confinement for each offense. Appellant argues the court erred by (1) refusing to allow him to ask prospective jurors whether they could consider five years probation when the victim of aggravated sexual assault was six years old; (2) allowing admission of extraneous offenses without sufficient notice prior to trial; (3) failing to give a limiting instruction on the extraneous offenses at the time they were offered; (4) overruling his requested charge instructing

the jury not to consider the extraneous offenses unless they found them true beyond a reasonable doubt; (5) commenting on the evidence by including the jury instruction, "you are instructed that a conviction is supportable on the uncorroborated testimony of the victim of the offense;" (6) failing to grant a directed verdict because of insufficient evidence; (7) failing to *sua sponte* instruct the jury at punishment phase it had to believe the extraneous offenses beyond a reasonable doubt before considering them; (8) refusing the inclusion of the lesser included offense of indecency with a child; and (9) refusing to quash the indictment because of its use of pseudonyms for the complainants. We affirm.

Voir Dire Question

Appellant first complains the court erred in refusing to allow him to ask prospective jurors if they could consider assessing five years probation in a case involving a six-year-old victim in an aggravated sexual assault case. Both complainants were six years old at the time of the offense. When appellant attempted to ask the question, the State objected and the court ordered appellant to ask a more general question. Appellant objected that the court was restricting him from intelligently exercising peremptory challenges.

We review a challenge to the trial court's limitation on voir dire examination under an abuse of discretion standard. *See Howard v. State*, 941 S.W.2d 102, 108 (Tex. Crim. App. 1996). The trial court has wide discretion in controlling the voir dire examination and may impose reasonable restrictions on the process. *See Allridge v. State*, 850 S.W.2d 471, 479 (Tex. Crim. App. 1991); *see Caldwell v. State*, 818 S.W.2d 790, 793 (Tex. Crim. App. 1991). To ascertain the views of the veniremen on issues pertinent to a fair determination of the case, the court of criminal appeals permits the use of hypothetical fact situations to help explain the application of the law. *See Maddux v. State*, 862 S.W.2d 590, 591-92 (Tex.Crim.App.1993) If the question is proper, an answer denied prevents intelligent use of the peremptory challenge. *See Mathis v. State*, 576 S.W.2d 835, 837 (Tex. Crim. App. 1979). It is improper, however, to use a hypothetical question to commit veniremen to a specific set of facts. *See Sadler v. State*, 977 S.W.2d 140, 142-43 (Tex. Crim. App. 1998). Potential jurors must only "be able, in a sense, to conceive both of a situation in which the minimum penalty would be appropriate and of a

situation in which the maximum penalty would be appropriate." *Id.* (quoting *Fuller v. State,* 829 S.W.2d 191, 200 (Tex. Crim. App. 1992)).

Our case presents a scenario similar to that in *Saunders v. State,* 780 S.W.2d 471, 476 (Tex. App.–Corpus Christi 1989), *rev'd on other grounds,* 840 S.W.2d 290 (Tex. Crim. App. 1992). In that negligent homicide case, the trial court refused to allow defendant to ask jurors whether they could give him probation where the complainant was five months old. *Id.* at 475. The court of appeals affirmed. It noted that an accused may question prospective jurors concerning their feelings about the range of punishment and probation so he could intelligently exercise his peremptory challenges. *Id.* at 476. However, it held the exercise did not include asking the jurors whether they could assess a minimum sentence under the facts of the case. *Id.* Such a question represents an improper attempt to commit prospective jurors to what their verdict would be with regard to a particular fact situation. *Id.* (citing *Williams v. State,* 481 S.W.2d 119, 121 (Tex. Crim. App. 1972).

Texas courts have found questions asking prospective jurors to consider a given punishment under the facts of the case to be improper in numerous other scenarios. *See, e.g., Chimney v. State,* 6 S.W.3d 681, 689-90 (Tex. App.–Waco 1999, pet. filed) (whether jurors could consider five years probation if the complainant were pregnant); *Bailey v. State,* 838 S.W.2d 919, 920-22 (Tex. App.--Fort Worth 1992, pet. ref'd) (whether jurors could "be fair and give fair consideration of a probated sentence if the evidence showed that the complainant was at the time of an age between one and two years"); *Hilla v. State,* 832 S.W.2d 773, 776 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd) (whether prospective juror "based on the publicity he had read was open to a five-year probated sentence").

In this case, appellant attempted to have the jurors commit themselves to considering a punishment (five years probation) under the specific facts of the case (six-year-old complainant). Under the foregoing authorities, the court may reasonably restrict appellant from asking such a question.[1] *Id.; see Sadler,* 977

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[1] Appellant argues that *Cena v. State,* 960 S.W.2d 804 (Tex. App.–El Paso 1997) *rev'd on other grounds,* 991 S.W.2d 283 (Tex. Crim. App. 1999), presents the "identical issue" as this case. Appellant misreads *Cena.* There, the defendant initially asked the prospective jurors whether they could consider giving (continued...)

S.W.2d at 142-43. Therefore, the court did not abuse its discretion in instructing the appellant to ask a more general question. Appellant's first issue is overruled.

Admission of Extraneous Offenses

Next, appellant argues "the trial court erred in allowing testimony of extraneous offenses involving appellant and the two children." However, we are unable to ascertain from his issue precisely which statements he complains of and whether error was preserved for review. We will nevertheless deal with the ambiguity.

Appellant filed a request for notice of extraneous offenses prior to trial. He also filed a pre-trial motion objecting to the admission of extraneous offenses, *i.e.*, "sexual acts ... other than the acts of oral sex alleged in the indictment" and "any evidence oral sex was committed by [appellant on complainants] on more than one occasion."[2] The State did not file a formal notice of extraneous offenses it intended to use at trial. However, it filed notice of intent to use outcry statements, which included numerous sexual acts by appellant on complainants. Appellant claims this was insufficient to put him on notice of extraneous offenses. We disagree.

The purpose of the notice requirement for extraneous offenses under article 38.37 is to prevent surprise to the defendant and apprize him of the offenses the State plans to introduce at trial. *See Self v. State*, 860 S.W.2d 261, 264 (Tex. App.--Fort Worth, 1993, pet. ref'd). Likewise, the purpose of article

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[1] (...continued)
probation in an indecency case where the complainant was eight years old. The court sustained the State's "contracting" objection. The defendant then attempted to ask whether the jurors could be fair and impartial where the victim was eight years old. The trial court again sustained the State's objection. On appeal, the court noted that denial of a proper question which prevents the intelligent exercise of peremptory challenges constitutes an abuse of discretion. *Id*. at 806-07. However, it further stated that there is no error in refusing to allow counsel to ask a hypothetical question that is based on the facts peculiar to the case. *Id*. at 807 (citing *White v. State*, 629 S.W.2d 701, 706 (Tex. Crim. App. 1981)). The court then explicitly stated it was *not* faced with a question of the jurors' application of probation in reference to an eight-year-old complainant. *Id*. at 807-08. Rather, the issue was merely whether jurors could be fair and impartial where the complainant was eight years old. *Id*. It was on that general ground, not the specific question pertaining to probation, that the court reversed. Therefore, *Cena* is inapplicable.

[2] Emphasis deleted.

38.072 is to prevent the defendant from being surprised by the introduction of the outcry-hearsay testimony. *See Fetterolf v. State*, 782 S.W.2d 927, 930-31 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd). The State gave article 38.072 notice of the complainants' statements detailing incidents of sex acts by appellant which were not alleged in the indictment. Therefore, because appellant was provided notice that the State intended to put on evidence of these acts, the trial court did not abuse its discretion in admitting testimony of those acts. *See Cole v. State*, 987 S.W.2d 893, 897 (Tex. App.–Fort Worth 1998, pet. ref'd) (holding that notice pursuant to article 38.072 was sufficient to provide notice pursuant to article 38.37).[3] This issue is therefore overruled.

Failure to Provide Limiting Instruction While Witness Testifying

Appellant next argues that the court erred by refusing to give a limiting instruction on extraneous offenses testified to by Susan Wurl, the mother of one of the complainants. He correctly cites *Rankin v. State*, 974 S.W.2d 707 (Tex. Crim. App. 1996) and TEX. R. EVID. 105, for the proposition that a limiting instruction, upon proper request, must be given at the time of the testimony.

In this case, however, appellant requested a general limiting instruction just before this witness testified. As such, the request was premature because it was not contemporaneous with any extraneous offense testimony. *See* TEX. R. APP. P. 33.1(a)(1)(A). When Wurl did testify to anything that could be considered extraneous offenses, appellant failed to lodge any objection or request a limiting instruction. Therefore, appellant did not preserve error. *Id*.

Further, the complainant herself essentially gave the same testimony at issue. Appellant failed to object or request a limiting instruction for any of that testimony. Therefore, any error regarding improperly admitted evidence was waived because the same evidence was later admitted without objection. *See Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993); *see Howland v. State*, 966 S.W.2d 98, 100-01 (Tex. App.–Houston [1st Dist.] 1998), *aff'd*, 990 S.W.2d 274 (Tex. Crim. App. 1999). Appellant's issue is overruled.

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[3] To the extent appellant complains of any extraneous offenses other than those identified in the State's outcry notice, any error is waived.

Failure to Provide Limiting Instruction in Jury Charge

Appellant contends the trial court erred by refusing his request to instruct the jury in the court's charge as to the limited use of the extraneous offense evidence. As we held above, though, appellant has not shown where he properly objected to the admission of extraneous offense testimony. Once evidence is received without a proper limiting instruction, it becomes part of the general evidence in the case and may be used as proof to the full extent of its rational persuasive power. *See Saldivar v. State*, 980 S.W.2d 475, 493 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd) (trial court did not err by not charging the jury with a limiting instruction regarding extraneous offense; evidence had already been received without objection during trial) (citing *Garcia v. State*, 887 S.W.2d 862, 878-79 (Tex. Crim. App. 1994)). Once admitted, evidence that might have been inadmissible for certain purposes if the proper objection had been made is no longer limited in its use. *Id.* Therefore, the trial court did not err by not charging the jury with a limiting instruction regarding extraneous offense evidence. We overrule this point of error.

Comment on the Weight of the Evidence in Jury Charge

The trial court included the following instruction in the jury charge: "[y]ou are instructed that a conviction is supportable on the uncorroborated testimony of the victim of the offense."[4] Appellant argues the court erred in including this because (1) the court's assuming there had been a victim was an impermissible comment on the testimony and (2) the court may not single out one part of the testimony in its charge.

Even a seemingly neutral instruction about a particular type of evidence constitutes an impermissible comment on the weight of the evidence because such an instruction singles out a particular piece of

[4] At trial, appellant objected to the instruction as "a comment on the weight of the evidence." Generally, an objection that an instruction constitutes a comment on the weight of the evidence is too general to preserve error. *Harrington v. State*, 424 S.W.2d 237 (Tex. Crim. App.1968); *James v. State*, 418 S.W.2d 513 (Tex. Crim. App. 1967); *Rymer v. State*, 171 Tex. Crim. 656, 353 S.W.2d 35 (1962). However, the State did not claim appellant waived error, and under the present facts, the objection appears appropriate. Accordingly, we address the issue.

evidence for special attention. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14; *see Zani v. State*, 758 S.W.2d 233, 245 (Tex. Crim. App. 1988).

The choice of language by the trial judge, though he is quoting the statute, is inappropriate both to the State's burden of proof and the presumption of innocence. Specifically denoting the complainant as "victim" assumes an act was committed. This is exacerbated by adding the language "of the offense" which likewise assumes a crime has been committed, regardless of the evidence.

We find no material difference between the instruction at issue here and the one disapproved of by the court of criminal appeals in *Lemasters v. State*, 164 Tex. Crim. 108, 297 S.W.2d 170 (1956). In that case, the court held that the "[y]ou are charged that a conviction may be had for the offense of keeping for the purpose of gaming, a policy game, upon the uncorroborated testimony of an accomplice" was an impermissible comment on the weight of the evidence. We therefore hold the court erred by including the instruction.

We now determine whether sufficient harm resulted from the error to require reversal. The standard for determining harm in charge error is set forth in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). When an appellant timely preserves charge error, reversal is required if the error is calculated to injure the rights of the appellant, which means that there must be "some harm" to the accused from the error. *Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App.1994); *Almanza*, 686 S.W.2d at 171; TEX. CODE CRIM. PROC. ANN. art. 36.19. In determining whether the error was harmful and reversal is required, an evidentiary review must be conducted, as well as review of any part of the record as a whole that may illuminate the actual, not just theoretical, harm to the accused. *Arline v. State*, 721 S.W.2d 348, 351 (Tex.Crim.App.1986); *Almanza*, 686 S.W.2d at 174. For this review, the presence of actual harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record as a whole. *Almanza*, 686 S.W.2d at 171. If any harm is found after conducting this review, then reversal is required. *Abdnor*, 871 S.W.2d at 732.

The burden of proof lies with the appellant to persuade the reviewing court that he has suffered some actual harm as a consequence of the charging error. *Abdnor*, 871 S.W.2d at 732. Appellant provided no harm analysis. Therefore, he presents nothing for our review and has failed to meet his burden.

We note, however, we are not pointed to, nor do we observe, any place in the record indicating appellant was harmed by the erroneous instruction. The State did not emphasize the error in closing argument. Nor do we see any indication that it was referred to at any other time in the trial. Further, the charge otherwise included all protections to which appellant was entitled. Most importantly, the issue of appellant's guilt was not strongly contested. Appellant admitted he had engaged in sexual misconduct As noted below, he conceded in his letter to one of the parents that he was guilty of indecency; he claimed he did not instigate the contact. Though he asserted he was not guilty of aggravated sexual assault, his assertion distinguishing the offense was based on a clear misconception of the law. Appellant also admitted in a phone call to C.R.B.'s mother that, in reference to the instant case, he had "done wrong" and that he knew it at the time he was doing it. At closing argument, appellant's counsel stated, "I want to be up front with you and admit, obviously, that indecency with those children did happen."

Therefore, under the state of this record, we find no actual harm to appellant in "assuming" the existence of a victim. Likewise, appellant's multiple admissions of sexual misconduct, along with the significant other evidence of his guilt adduced at trial, forecloses us from finding the court's singling out a complainant's testimony caused him actual harm.[5] We therefore overrule this point of error.

Insufficient Evidence

Next, appellant argues that the evidence was insufficient to prove he engaged in oral-vaginal contact with the female complainant, C.R.B. In reviewing sufficiency of the evidence, viewing the evidence in the light most favorable to the verdict, we must decide whether any rational trier of fact could have found this essential element of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see Villalon v. State*, 791 S.W.2d 130, 132 (Tex.

[5] Under the same analysis, we find that the trial court's error did not violate appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b).

Crim. App. 1990). In *Villalon*, the court of criminal appeals set forth the standard to be used in judging the sufficiency of testimony by a child victim:

> [W]e cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults. To expect such testimonial capabilities of children would be to condone, if not encourage, the searching out of children to be the victims of crimes such as the instant offense in order to evade successful prosecution.

Id. Here, complainant testified that appellant "licked" her. When asked where, she pointed to herself and said it was on her "privates." She also testified appellant "licked her between the legs." In a videotape of complainant, played at trial without objection, she stated that appellant put his mouth on her vagina.

We hold this evidence was more than sufficient to enable a rational factfinder to have found beyond a reasonable doubt that appellant engaged in oral-vaginal contact with the complainant, C.R.B. We overrule appellant's issue.

Extraneous Offense Instruction at Penalty Phase

Appellant contends that the court erred in failing to *sua sponte* instruct the jury at the punishment phase that it had to believe the existence of extraneous offenses beyond a reasonable doubt before considering them. Appellant failed to request such an instruction. This issue was recently addressed. In *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999), the court held that this instruction need not be given at punishment phase in absence of a request. We therefore overrule this point of error.

Lesser Included Offense

Appellant next complains that the court erred in not charging the jury on the lesser included offense of indecency with a child. Under *Rousseau v. State*, 855 S.W.2d 666, 672-75 (Tex. Crim. App. 1993), the defendant is required to meet a two-prong test before a lesser included offense instruction must be given: (1) the lesser-included offense must be included within the proof necessary to establish the offense charged, and (2) some evidence must exist in the record that if the defendant is guilty, he is guilty only of the lesser offense. Appellant does not show how he meets the second prong of this test.

The sole evidence that appellant offers showing he committed indecency with a child and not aggravated sexual assault came in his letter to the father of one of the complainants. He wrote, "I am guilty but not Agrivated [sic] Sexual Assault; maybe 'indecency,' because I didn't 'anieate' [sic][initiate] any of the acts." Appellant's statement that he may be guilty of indecency because he did not "initiate any of the acts" is legally irrelevant to the determination of whether he is guilty of the statutory offense of "Indecency With a Child." *See* TEX. PEN. CODE ANN. § 21.11. There was no evidence that if appellant was guilty, he was guilty only of indecency with a child. Therefore, the court did not err in refusing his proposed charge. We overrule this point of error.

Motion to Quash Indictment

Finally, appellant contends the court erred in refusing to quash the indictments using pseudonyms for the complainants' actual names. He concedes that TEX. CODE CRIM. PROC. ANN. art. 57.02 authorizes the use of pseudonyms in this context but argues that this statute violates his due course rights under the Texas Constitution.

In *Stevens v. State*, 891 S.W.2d 649, 651 (Tex. Crim. App. 1995), the court held the fatal variance doctrine is inapplicable to pseudonym cases so long as the defendant's due process right to notice is satisfied. Here, appellant does not claim he did not have actual notice of the complainants' identities. In fact, the record is abundantly clear that appellant did know their identity. In short, appellant provides nothing to show his right to notice was not satisfied or his due course rights were otherwise violated. Therefore, appellant's final issue is overruled.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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