

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

Hodges v. State

No. 02-13-00073-CR, 2014 WL 7204668 (Tex. App.—Fort Worth Dec. 18, 2014) (mem. op.) · No. 02-13-00073-CR · Decided April 16, 2015

SUMMARY

This document is Charles Lee Hodges’s Second Corrected Petition for Discretionary Review filed in the Texas Court of Criminal Appeals in cause number PD-0258-15. The petition challenges the Eleventh Court of Appeals’ application of the egregious-harm standard to the trial court’s failure to inform the jury of the State’s election of the specific incident supporting an indecency-with-a-child conviction.

CASE DETAILS

COURT	Court of Appeals of Texas, Second District, Fort Worth
WRITING FOR THE COURT	Sue Walker; Dauphinot; Gardner; Walker
JURISDICTION	Texas
DECIDED	April 16, 2015
DOCKET	02-13-00073-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Hodges appealed his convictions for indecency with a child by contact. He challenged the failure to instruct the jury regarding the State's election of a specific incident, the admission of opinion testimony concerning the complainant's truthfulness, and the admission of hearsay testimony. The court of appeals affirmed.
STANDARD OF REVIEW	Unobjected-to jury-charge error is reviewed for egregious harm under Almanza and article 36.19. Evidentiary rulings are reviewed for abuse of discretion. Preserved evidentiary error is evaluated for harm under Texas Rule of Appellate Procedure 44.2(b), and unpreserved complaints are forfeited under Rule 33.1.
PRECEDENTIAL VALUE	unpublished, not designated for publication
PARTIES	Charles Lee Hodges v. The State of Texas

TOPICS

jury instructions

standard of review

harmless error

preservation of error

criminal procedure

PRACTICE AREAS

criminal procedure

appellate procedure

jury instructions

evidence

QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury on the State's election of the specific incident supporting the conviction caused egregious harm when Hodges did not object to the charge.
2. Whether the trial court abused its discretion by admitting opinion testimony concerning the complainant's character for truthfulness.
3. Whether the trial court abused its discretion by admitting testimony about statements allegedly made by the complainant, and, if so, whether the error affected a substantial right.

HOLDINGS

1. When an indictment alleges one sexual assault but the evidence shows multiple acts, the State must elect the specific incident supporting conviction upon a timely defense request, and the defendant is entitled to an instruction limiting the jury's consideration to that elected act. Because Hodges did not object to the charge, the error was reviewed for egregious harm; the omission did not deprive him of a fair and impartial trial.
2. Hodges forfeited his argument that the testimony violated Texas Rule of Evidence 608 because his objections in the trial court did not preserve that specific ground.
3. Any error in admitting the challenged hearsay testimony was harmless under Texas Rule of Appellate Procedure 44.2(b) because it did not have a substantial or injurious effect or influence on the jury's verdict.

KEY QUOTATIONS

*“Following the State's election of the act on which it will proceed for conviction, the defendant is entitled to an instruction charging the jury to consider only the elected act in deciding guilt and limiting the jury's consideration of all other unelected acts to the purposes for which they were admitted.” (*4)*

*“Having considered the harm to Hodges in light of the charge, the state of the evidence, the parties' arguments, and the purposes of the election rule, we hold that the trial court's error in failing to instruct the jury regarding the State's election was not so egregious and did not create such harm as to deny Hodges a fair and impartial trial.” (*6)*

FACTUAL BACKGROUND

The complainant testified that Hodges touched her breast and female sexual organ on multiple occasions while they watched television on his couch, beginning when she was nine years old. At Hodges's request, the State elected the first fondling incident occurring on the couch in 2009 as the conduct supporting the relevant count, but the trial court and parties never communicated that election to the jury and the charge did not limit the jury to

the elected incident. Hodges admitted that the complainant had placed his hand on her crotch during an August 2009 visit, but said he immediately pulled it away and denied the other allegations.

PROCEDURAL HISTORY

Hodges was charged in Tarrant County with two counts of indecency with a child. A jury convicted him on the count alleging touching the child's female sexual organ and acquitted him on the count alleging touching the child's breast. The trial court assessed eight years' confinement. The Second Court of Appeals affirmed the trial court's judgment on December 18, 2014, and denied rehearing on February 5, 2015.

DISPOSITION

affirmed

CASES CITED

- Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)
- Cosio v. State, 353 S.W.3d 766, 776-77 (Tex. Crim. App. 2011)
- Dixon v. State, 201 S.W.3d 731, 734-36 (Tex. Crim. App. 2006)
- Duffey v. State, 326 S.W.3d 627, 630, 634 (Tex. App.—Dallas 2009, no pet.)
- Hodges v. State, No. 02-13-00073-CR, 2014 WL 7204668 (Tex. App.—Fort Worth Dec. 18, 2014)
- King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)
- McClendon v. State, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. 1982)
- Motilla v. State, 78 S.W.3d 352, 355-56 (Tex. Crim. App. 2002)
- Mosley v. State, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), cert. denied, 526 U.S. 1070 (1999)
- O'Neal v. State, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988)
- Phillips v. State, 193 S.W.3d 904, 909-10, 913-14 (Tex. Crim. App. 2006)
- Reza v. State, 339 S.W.3d 706, 713-17 (Tex. App.—Fort Worth 2011, pet. ref'd)
- Smith v. State, Nos. 02-08-00394-CR, 02-08-00395-CR, 2010 WL 3377797, at *13 (Tex. App.—Fort Worth Aug. 27, 2010, no pet.)
- Solomon v. State, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001)