Affirmed and Majority and Concurring Opinions filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00887-CR

HENRY DEE GILMORE, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122ND District Court
Galveston County, Texas
Trial Court Cause No. 96-CR1462

M A J O R I T Y O P I N I O N

Henry Dee Gilmore appeals a conviction for aggravated assault on numerous grounds. We affirm.

Sufficiency of the Evidence

Appellant's first point of error challenges the legal and/or factual sufficiency of the evidence to prove that: (a) the complainant suffered an assault; (b) appellant was the assailant; (c) the assault occurred on or about September 8, 1996; (d) appellant possessed the necessary culpable mental state; (e) the complainant suffered a serious bodily injury; or (f) appellant exhibited a deadly weapon.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). A factual sufficiency review takes into consideration all of the evidence related to the challenge and weighs the evidence which tends to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 23, 1999) (No. 99-6384). The jury's verdict will be upheld unless it is so against the great weight of the evidence that it is clearly wrong and unjust, *i.e.*, manifestly unjust, shocking to the conscience, or clearly biased. *See id*.

Existence of Assault and Identity of Assailant

Appellant's first point of error first argues that the State failed to prove that the complainant was, in fact, assaulted or that the assailant, if any, was appellant. In support of these contentions, appellant's brief outlines at length the testimony supporting these facts and then attempts to show its inconsistencies, lack of credibility, and lack of corroboration, none of which can render evidence legally or factually insufficient. Although appellant's brief cites some controverting testimony, it does not establish that the verdict is so against the great weight of the evidence that it is clearly wrong and unjust. Therefore, these sufficiency challenges are overruled.

Date of Offense

Appellant's first point of error next argues that the State failed to prove that the assault, if any, occurred on September 8, 1996, because of alleged discrepancies between the complainant's testimony and the medical records as to when the assault occurred during the period from September 5 to September 9, 1996. However, when an indictment alleges that a crime occurred "on or about" a certain date, the State can rely upon an offense with a date other than the one specifically alleged so long as the date is anterior to the presentment of the indictment and within the statutory limitation period and the offense relied upon otherwise meets the description of the offense contained in the indictment. *See Yzaguirre v. State*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997).

In this case, appellant's original indictment, dated October 16, 1996, alleged that the offense occurred on or about September 8, 1996. All of the dates from September 5 to September 9 are anterior to the presentment of the indictment and within the statutory limitation period. Therefore, any discrepancy in the evidence as to the date of the offense as among those dates does not render the evidence legally or factually insufficient. Accordingly, this ground of challenge is overruled.

Culpable Mental State

Appellant's first point of error next argues that the State failed to prove that appellant possessed the necessary culpable mental state because the evidence proved only that he intended to engage in the *conduct* but not that he intended to cause the *result*, *i.e.*, serious bodily injury. In order to convict appellant of aggravated assault, as alleged in his indictment, it was necessary for the State to prove that he intentionally, knowingly, or recklessly caused bodily injury to the complainant. *See* TEX. PEN. CODE ANN. §§ 22.01(a), 22.02(a) (Vernon 1994). However, the jury may infer the requisite intent from the conduct of the defendant. *See, e.g., Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Crim. App. 1995). Therefore, the lack of direct evidence that appellant intended to cause serious bodily injury does not render the evidence legally or factually insufficient. Nor has appellant demonstrated that his conduct failed to circumstantially prove an intent to cause serious bodily injury. Accordingly, this ground of challenge is overruled.

Existence of Serious Injury

Appellant's first point of error next contends that the injury suffered by the complainant from the assault was a not a serious bodily injury because the complainant suffered only a fractured ankle, had no other injuries, received routine medical treatment, and was released from the hospital in good and improved condition with no signs of osteoporosis. However, the fact that the complainant suffered an ankle fracture dislocation and will never have normal use of her foot again is legally sufficient to establish a serious bodily injury, and the inconsistencies in the evidence cited by appellant do not render it factually insufficient. Accordingly, this sufficiency challenge is overruled.

Deadly Weapon

Finally, appellant argues that the State failed to prove that he used or exhibited a hand or foot as a deadly weapon, as alleged in the indictment, because a hand or foot is not a deadly weapon *per se* and no evidence was presented as to the relative size of the parties, the size and condition of the hands or feet of appellant, how they were used in the assault, or what injuries were inflicted by hands, arms, or feet. However, the complainant's testimony that appellant beat her and kicked her severely, resulting in a broken ankle and hospitalization, are sufficient proof that appellant used and exhibited a hand and foot as deadly weapons, and appellant presented no evidence to the contrary. Because this ground of challenge therefore fails to demonstrate legal or factual insufficiency of the evidence, it is overruled, and appellant's first point of error is overruled.

Evidentiary Rulings

Appellant's second point of error argues that the trial court erred in excluding: (a) the written report of an emergency medical technician ("EMT") that was admissible under the business records or recorded recollection exceptions to the hearsay rule; (b) a hospital nurse's report that was admissible as under the business records exception; (c) the testimony of a witness concerning the complainant's behavior and possible motive or bias against appellant. Appellant's third point of error argues that the trial court erred in failing to undertake the requisite balancing test of probative value versus prejudicial effect of evidence of appellant's two prior convictions before admitting the evidence for impeachment.

Standard of Review

A trial court's evidentiary rulings are reviewed for abuse of discretion. *See Bingham v. State*, 987 S.W.2d 54, 57 (Tex. Crim. App. 1999). If a decision to exclude evidence is correct on any theory of law applicable to the case, it will be sustained. *See Weatherred v. State*, 975 S.W.2d 323, 323 (Tex. Crim. App. 1998).

EMT Report

Appellant's second point of error first argues that the trial court erred in excluding the report of the EMT who first treated the complainant because the report was admissible under the business records and the recorded recollection exceptions to the hearsay rule. The business records exception states that the following is not excluded by the hearsay rule:

> [a] . . . report . . . made at or near the time by, or from *information transmitted by, a person with knowledge*, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report, *. . . all as shown by the testimony of the custodian or other qualified witness*, or by affidavit that complies with Rule 902(10) . . . .

TEX. R. EVID. 803(6) (emphasis added). Even if the witness is not a person with knowledge of the information in the report and cannot identify such a person, the "person with knowledge" requirement of rule 803(6) is satisfied if the evidence reflects that the records are: (i) generated pursuant to a course of regularly conducted business activity and (ii) as a practical matter, always created by or from information transmitted by a person with knowledge, at or near the time of the event. *See Clark v. Walker-Kurth Lumber Co.*, 689 S.W.2d 275, 281 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

In this case, the EMT testified that: (1) the exhibit appeared to be a "run sheet" for the complainant and date in question; (2) he is required to make such a report when he goes to the scene of a call; (3) he is aware of "what's going on" at the time he makes such a report; (4) most of the information is recorded during the call; and (5) the writing appeared to be his and the report was his. However, the EMT could only assume that it was a call he went on because he had no memory of going on the call or of the facts written on the report. The EMT did not testify whether anyone else had knowledge of the information in the report. Because there is no evidence that the EMT had personal knowledge of the information in the report, that the person providing the information reflected in the report had personal knowledge of it, or

that, as a practical matter, such reports are always created by or from information transmitted by a person with knowledge, the report lacked a sufficient foundation to qualify under the business records exception.[1]

In addition, where a record incorporates a statement by a citizen who is not part of the regularly conducted activity and thus has no duty to make the report, the record will be treated as double hearsay and thus inadmissible to prove the truth of the matter asserted unless the citizen's statement independently falls within an exemption from or exception to the hearsay rule. *See Stapleton v. State*, 868 S.W.2d 781, 784 (Tex. Crim. App. 1993). Therefore, even if the EMT's report in this case had been proven up as a business record, a separate exception would have been required to make the complainant's statement therein admissible. Because appellant failed to both provide the predicate to establish the EMT's report as a business record and to offer or establish a second exception for the complainant's statements in the report, the trial court did not err in failing to admit the report as a business record.

The recorded recollection exception to the hearsay rule states that the following is not excluded as hearsay:

> [a] . . . record concerning a matter about which a *witness once had personal knowledge* but now has insufficient recollection to enable the witness to testify fully and accurately, *shown to have been made or adopted by the witness when the matter was fresh in the witness' memory* and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness.

TEX. R. EVID. 803(5) (emphasis added). In this case, the evidence did not establish either that the report concerned a matter about which a witness once had personal knowledge or that the report was made or adopted by a witness when the matter was fresh in his memory. Therefore, the trial court did not abuse its discretion in failing to admit the report under the recorded recollection exception.

Nurse's Report

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[1] *Compare Knox v. Taylor*, 992 S.W.2d 40, 64 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (holding that "person with knowledge" predicate was not established); *Sholdra v. Bluebonnet Sav. Bank, FSB*, 858 S.W.2d 533, 535 (Tex. App.–Fort Worth 1993, writ denied); *with Moyer v. State*, 948 S.W.2d 525, 528 (Tex. App.—Fort Worth 1997, pet. ref'd) (holding that person with knowledge predicate was met where EMT testified that the entries in his report were related to him by the victim, a person with knowledge of those matters).

Appellant's second point of error next argues that the trial court erred in excluding a nurse's report that was admissible under the business records exception to the hearsay rule.[2]

Appellant moved to admit the complainant's hospital records into evidence as a single exhibit. Without anything further being said about this request, the record reflects that the trial judge dismissed the jury from the courtroom and took a brief recess. The record resumes with discussions taking place outside the presence of the jury concerning whether appellant will be able to admit "that." The trial judge responds that it will be admitted with "those exceptions." The following exchange then occurred:

> THE COURT: You don't have any objection to it with those exceptions?
>
> [DEFENSE COUNSEL]: I won't bring those items up with him but it will be in evidence. If we don't get it admitted we'll pull it out.
>
> THE COURT: We can excise it if it's not in evidence. You said you didn't have any objection to it –
>
> PROSECUTOR: Other than those portions, your Honor.

The trial court then proceeded to admit the hospital records subject to the redaction of the statements purportedly made by the complainant, "particularly the ones where she is talking about a stranger attacking her. . . ." With regard to those statements, the judge stated that the complainant would be recalled by defense counsel and asked whether she made those statements after laying the proper predicate.

During a voir dire examination of the complainant outside the presence of the jury, appellant's counsel asked the complainant whether she made a statement to a nurse that she had been attacked in her home by a stranger. The complainant responded that she had not made that statement. At that time, appellant moved to admit the page containing the statement that had been previously redacted. The State

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[2] Because appellant has not asserted in the trial court or on appeal that any of the excluded reports were not hearsay because they were offered only for the limited purpose of impeachment and not for the truth of the matters asserted, we do not address that contention. Nor has appellant asserted that any information in the excluded reports was admissible under the exception for statements made for purposes of medical diagnosis or treatment under Texas Rule of Evidence 803(4). Similarly, because appellant did not assert in the trial court, as he attempts to on appeal, that any statements in the reports were admissible under the statement against interest exception, that contention presents nothing for our review.

objected to the page's admission on the ground that it did not fall within the hearsay exception and that the nurse should be brought in to testify. The trial court sustained the State's objection without response by appellant's counsel. Because appellant has directed us to no portion of the record where the redacted portion of the excluded page was proven up as a business record, we have no basis to conclude that the trial court erred in failing to admit it as such.

Jones's Testimony

Appellant's second point of error next argues that the trial court erred in limiting the testimony of Airrie Jones concerning the complainant's bias against appellant.[3] Jones testified that he knew the complainant and had been a guest in her home during the time immediately preceding the trial. When appellant attempted to question Jones as to how he came to be a guest in complainant's home, the State objected based on relevance. At the conclusion of a sidebar conference not reflected in the record, the trial court sustained the objection.

After both the State and appellant rested their cases *and the jury retired to deliberate*, appellant made an offer of proof of Jones's proposed testimony.[4] A party making an offer of proof "shall, as soon as practicable, *but before the court's charge is read to the jury*, be allowed to make, in the absence of the jury, its offer of proof." *See* TEX. R. EVID. 103(b) (emphasis added). In this case, there is no indication in the record that appellant requested, or the trial court refused to allow him, to make his offer of proof before the court's charge was read to the jury. Because appellant's offer of proof was not made before the court's charge was read to the jury, no complaint was preserved, and this issue presents nothing for our review. Accordingly, appellant's second point of error is overruled.

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[3] A defendant is allowed great latitude to show any fact which would tend to establish ill feeling, bias, motive, and animus on the part of the witness testifying against him. *See McDuff v. State*, 939 S.W.2d 607, 617 (Tex. Crim. App.), *cert. denied*, 118 S.Ct. 125 (1997). However, this right does not prevent a trial court from imposing some limits on the cross-examination into the bias of a witness. *See id.* Within reason, the trial judge should allow the accused great latitude to show any relevant fact that might affect the witness's credibility. *See id.*

[4] Appellant claims that Jones's testimony showed that, based on similar conduct with another boyfriend in the past, the complainant would have filed false charges against appellant to get even with him for leaving her.

Impeachment with Prior Convictions

Appellant's third point of error argues that the trial court erred in failing to undertake the requisite balancing test of probative value versus prejudicial effect of evidence of appellant's two prior convictions before admitting the evidence for impeachment.

Evidence of a witness's prior convictions is admissible for impeachment only if the crime was a felony or involved moral turpitude, and the trial court determines that the probative value outweighs the prejudicial effect. *See* TEX. R. EVID. 609(a). However, as prerequisites to preserving a complaint for appellate review, a party must generally object, state the specific ground for the objection, and obtain an adverse ruling. *See* TEX. R. APP. P. 33.1(a). The failure to object to a conviction offered for impeachment on the ground that its probative value is outweighed by its prejudicial effect waives any complaint on that basis. *See Ramirez v. State*, 873 S.W.2d 757, 762-63 (Tex. App.—El Paso 1994, pet. ref'd).

In this case, when the State attempted to impeach appellant with a prior conviction from 1983, appellant's counsel asked to approach the bench and a sidebar conference was held off the record. After the conference, the trial court stated that the objection was sustained and gave the jury an instruction to disregard the question. Immediately thereafter, the State attempted to impeach appellant with a prior conviction from 1995. Appellant made only a general objection, and the trial court overruled it. Later, the State again attempted to impeach appellant with his 1983 conviction. This time, appellant's counsel made no objection and appellant admitted the conviction in front of the jury. Because appellant failed to object to the 1995 conviction or the 1983 conviction, the second time it was raised, on the ground that probative value was outweighed by prejudicial effect, he waived any complaint on that basis. Therefore, appellant's third point of error is overruled.

Jury Charge

Instruction on Concurrent Causation

Appellant's fourth point of error argues that the trial court erred in submitting, over objection, an instruction on concurrent causation where the court failed to apply the law to the facts regarding that issue.[5] More specifically, appellant claims that: (i) no charge on the issue of concurrent causation should have been given in this case because the issue is not presented where the actor denies ever committing the charged conduct; (ii) the trial court failed to include an application paragraph on causation; (iii) the court's charge lessened the State's burden of proof on the issue of the required *mens rea* necessary to convict on the offense of aggravated assault; and (iv) the abstract instruction was misleading and confusing to the jury in that it conflicted with other specific instructions given by the court. Because appellant's brief does not explain how the instruction lessened the State's burden of proof or conflicted with other instructions given by the court, those contentions present nothing for our review.

As general prerequisites to preserving an objection to charge error for appellate review, a party must object, state the specific grounds for the objection, and obtain an adverse ruling. *See* TEX. CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1999); *Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996). To secure a reversal for a charge error to which no objection was raised at trial, an appellant must show egregious harm. *See Cathey v. State*, 992 S.W.2d 460, 466 (Tex. Crim. App. 1999), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 14, 1999) (No. 99-6206).

The only portion of the record appellant has cited as containing an objection to the concurrent cause instruction is the following:

> [DEFENSE COUNSEL]: Your Honor . . . I am concerned about the second paragraph there [regarding concurrent causation] and I want to know if it's been left in, . . . that looks like a part of the transferred intent charge. Was that left in?
>
> PROSECUTOR: Yes, it was.

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[5] This point of error complains of the following instruction in the charge:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

No application paragraph concerning this portion of the charge was included in the final jury charge.

[DEFENSE COUNSEL]: *Then that needs to come out too.*

PROSECUTOR: Transferred intent and causation are two totally different theories. Transferred intent deals with intending to hurt one person or intending to cause one crime and another one is committed. Causation deals with doing a particular act and having that particular act produce a result. They are two totally separate legal documents.

[DEFENSE COUNSEL]: Moving down then, your Honor, moving down to Page 2, the next to the last full paragraph . . . .

(emphasis added). To the extent the italicized portion can be considered an objection, no ground for it was stated and no adverse ruling was obtained. Therefore, no complaint was preserved. Moreover, although appellant's brief contends in its final sentence on this point that appellant was egregiously harmed by this instruction, the brief provides no authorities, facts, or reasoning to support a claim of egregious harm.

Lastly, an abstract charge on a theory of law which is not applied to the facts in an application paragraph is not sufficient to bring that theory before the jury. *See, e.g., McFarland v. State*, 928 S.W.2d 482, 515 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119 (1997). Therefore, the inclusion of a correctly stated but superfluous abstraction never produces error in the charge because it has no effect on the jury's ability to fairly and accurately implement the commands of the application paragraphs. *See Plata v. State*, 926 S.W.2d 300, 302-03 (Tex. Crim. App. 1996). Thus, even if appellant had properly objected to the inclusion of this abstract portion of the charge, the overruling of that objection would not have been error. *See Hughes v. State*, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1112 (1995). Because point of error four thus fails to demonstrate error, it is overruled.

Variance Between Indictment and Charge

Appellant's fifth point of error argues that the trial court erred by allowing the State to informally amend its indictment, over objection and after trial commenced, by submitting a jury instruction which changed the manner of committing the offense and deleted descriptive allegations of substance from the indictment other than by abandonment. Appellant's indictment alleged various facts in the conjunctive:

> [Appellant] did then and there intentionally, knowingly, *and* recklessly cause serious bodily injury to [complainant] by throwing [complainant] to the ground with the hand *and* arm

> of [appellant] *and* by pulling on [complainant] with the hand *and* arm of [appellant] *and* by striking *and* hitting [complainant] with the foot *and* hand of [appellant].

(emphasis added).

By contrast, the relevant portion of the jury charge stated those facts in the disjunctive:

> [Appellant] did intentionally, knowingly, *or* recklessly cause serious bodily injury to [complainant] by then and there throwing [complainant] to the ground with the hand *or* arm of [appellant] *or* by pulling on [complainant] with the hand *or* arm of [appellant] *or* by striking *or* hitting [complainant] with the foot *or* hand of [appellant], then you will find [appellant] guilty of aggravated assault, as charged in the indictment.

(emphasis added).

At trial, after referencing this portion of the charge, appellant objected to it in the following manner:

> [DEFENSE COUNSEL]: I do understand pleading in the conjugative [sic] and proving in the disjunctive. . . . They can plea [sic] intentionally, knowing and recklessly and prove either of them. . . . But where the state has provided manner and means in their indictment that's the proof they are to be held to under the indictment. And they presented evidence on all of them and the jury has a right to decide.
>
> THE COURT: Objection overruled.

Appellant argues that because the assault statute does not list alternative ways to cause the bodily injury element, alternative allegations of the means by which the bodily injury was caused, though unnecessary, must be proved as alleged where none were abandoned.

Where unnecessary matter alleged in an indictment is descriptive of that which is legally essential to charge a crime, the State must prove it as alleged even though it is needlessly pled. *See Eastep v. State*, 941 S.W.2d 130, 134 n.7 (Tex. Crim. App. 1997). Thus, for example, where an indictment describes a person, place, or thing with unnecessary particularity, the State must prove all circumstances of the description. *See id.*

Conversely, the State is allowed to plead all alternative theories of an offense which the evidence may ultimately prove; that is, it is allowed to anticipate variances in the proof by pleading alternative "manner and means" in the conjunctive when proof of any one theory of the offense will support a guilty verdict. *See Lawton v. State*, 913 S.W.2d 542, 551 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S.

826 (1996). When the State does so, it is not required to prove guilt under all of the theories alleged; proof of guilt under one theory of the offense will suffice for conviction. *See id*. Although an indictment may allege different methods of committing the offense in the conjunctive, it is proper for the jury to be charged in the disjunctive. *See Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 958 (1992).[6]

In this case, even though the indictment alleged several means of committing the assault in the conjunctive, it was permissible for the jury to be charged on those alternative means in the disjunctive. *See id*. Therefore, appellant's fifth point of error is overruled.

"On or about" Instruction

Appellant's sixth point of error argues that the trial court erred in submitting the following instruction on the legal meaning of "on or about" a certain date because the definition: (i) is an erroneous statement of the law; (ii) is an impermissible comment on the weight of the evidence; (iii) lessens the State's burden of proof on a matter of substance essential to the State's case; and (iv) affects the determination of the credibility of the witnesses by the jury:

> You are instructed that when an indictment alleges an offense occurred "on or about" a certain date it means that the Defendant may be convicted if you believe beyond a reasonable doubt that the Defendant committed the offense within the period of the statute of limitation preceding the filing of the indictment. In this case, the indictment was filed February 4, 1997, and the statute of limitation for the offense of aggravated assault is three (3) years.

After referencing this portion of the charge, appellant objected to it for lack of notice:

> [DEFENSE COUNSEL:] In this case the indictment was filed October 16th, 1996 and the statute of limitations for aggravated assault is three years. The purpose of an indictment, your Honor, is to give the defendant reasonable notice of what he's charged with. If you allow a three, if you tell a defendant it was on or about a certain date he has a right to rely on on or about. It has to be on or about, but it has to be a

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[6] When a jury returns a general guilty verdict on an indictment charging alternative theories of committing the same offense, the verdict stands if the evidence supports any of the theories charged. *See Brooks v. State*, 990 S.W.2d 278, 283 (Tex. Crim. App. 1999), *cert. denied*, ___ S.Ct. ___ (1999).

> reasonable notice. It has to be a reasonable period of time. Three years is not reasonable, your Honor, and the jury should not be allowed to think that anything that happened in June might be, you know, a part of this or anything that happened even prior to the defendant meeting the complaining witness might be a part of this. There is no reasonable notice given. That indictment is there, it's reasonable notice, it's what we prepared for. Changing and amending the indictment at this stage is out of the question under the law. And on the second page in this case the indictment was filed on October 16, 1996. That's certainly a fact that's not in evidence in this case. The statute of limitations for the aggravated assault offense is three years. That's a statement of law okay but it doesn't mean and it leads the jury to believe that any time within that three year period is sufficient for them to convict the defendant. That's incorrect and I object.
>
> THE COURT: That's what the law is.
>
> [DEFENSE COUNSEL:] Your honor, we would also ask the court to take judicial notice of this indictment having been returned on October the 16th of 1996. . . .

As general prerequisites to preserving a complaint of charge error for appellate review, a party must object, state the specific grounds for the objection, and obtain an adverse ruling. *See* TEX. CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1999); *Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996). In addition, an appellant's complaint on appeal must comport with his objection at trial. *See Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). To secure a reversal for a charge error to which no objection was raised at trial, an appellant must show egregious harm. *See Cathey*, 992 S.W.2d at 466.

Because appellant failed to obtain an adverse ruling on his objection to the on or about language and because the grounds stated for his objection at trial do not comport with those for his complaint on appeal, his complaint was not preserved for appellate review. In addition, appellant has provided no authority, facts, or reasoning demonstrating that: (i) the definition of "on or about" in this case differed from applicable law; (ii) a conviction has ever been reversed for the inclusion of such a definition in the jury

charge; (iii) the instruction is an impermissible comment on the weight of the evidence; (iv) the instruction lessens the State's burden of proof on a matter of substance essential to the State's case; (vi) the instruction affects the determination of the credibility of the witnesses by the jury; or (vii) he was otherwise unfairly prejudiced by this definition. Because point of error six thus provides no basis upon which it can be sustained, it is overruled.

Enhancement

Appellant's seventh point of error argues that the trial court erred by using a third degree felony punished as a misdemeanor to enhance appellant's punishment to habitual offender status. Appellant claims that, under section 12.42(e) of the Texas Penal Code, use of prior convictions for enhancement is limited to convictions punished as felonies of the third degree or above.

A defendant who fails to object to any defects of substance or form in the charging instrument prior to the day of trial waives the right to object to the defect and may not raise the objection on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1998). Furthermore, to preserve a complaint for appellate review, a party must generally present a timely request, objection, or motion to the trial court, stating the grounds for the desired ruling, and secure a ruling from the trial court. *See* TEX. R. APP. P. 33.1(a).

In this case, appellant neither objected to the enhancement portion of the indictment before trial nor objected to the enhancement provision of the charge during trial. Because error was thus not preserved on this point of error, it is overruled and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 28, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3 (b).

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C O N C U R R I N G O P I N I O N

I disagree with the majority's holding the trial court did not err in refusing to admit the EMT's report and complainant's statement within. However, I concur in the result.

The EMT's Report

The gist of majority's objection to the admissibility of the report is that the EMT was unable to testify he or anyone else had personal knowledge of the information in the report, thus it does not qualify as a "record of a regularly conducted activity" under TEX. R. ENID. 803(6). In so doing, it seems to ignore the true significance of having the EMT himself on the stand. Unlike most business records, which are offered without the person who generated it being available, this record could only have been generated

by that EMT; he testified it was written in his hand. Taken along with the EMT's testimony that the report itself was a "run sheet" for the complainant on date of the offense, it was his regular practice and a requirement of his to make the report at or near the time he treated complainant, and he had personally generated reports of this type over 1,400 times previously, the *only* reasonable inference was that the record was transmitted by "a person with knowledge," namely, himself. The fact that the EMT did not remember writing this record of a regularly conducted activity did not go to its admissibility, but its weight. Therefore, to hold the report was inadmissible for the reasons offered by the majority is to dwell on hyper technical points of little substance.[1]

Complainant's Statement Within the Report

When the defense attempted to introduce the EMT's report into evidence at trial, the State only objected to its admission on the ground it did not meet the requirements of Rule 803(6). It did not object to complainant's statement within the report as another level of hearsay and did not complain of or brief the inadmissibility of the complainant's statement, as found by the majority.

Within the EMT's report is a statement allegedly related by the complainant that she "was assaulted by her husband." The statement is significant because complainant was married to a person other than appellant when the statement was allegedly made.

The majority holds this statement was inadmissible hearsay within hearsay. Complainant's statement, however, was made to the EMT, the first medical person on the scene for providing her initial medical diagnosis and treatment. While the identity of complainant's attacker was not a direct statement as to her condition, it was pertinent to her medical treatment.[2] Therefore, it was admissible under Rule 803(4) as a statement for purposes of medical diagnosis or treatment.[3]

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[1] Ironically, appellant should have easily gotten the report into evidence if he had called the custodian of records, who would have certainly had far less competence than the EMT to testify as to the trustworthiness of the report. Trustworthiness is, of course, the touchstone of admissibility for this type record.

[2] *Tissier v. State,* 792 S.W.2d 120, 125 (Tex. App.–Houston [1st Dist.] 1990, pet. ref'd); *Gohring v. State* 967 S.W.2d 459, 461 (Tex. App.–Beaumont 1998, no pet.).

[3] It was also a prior inconsistent statement by witness under Rule 801(e)(1)(A), and an admission by party-opponent under Rule 801(e)(2).

Harm Analysis

The trial court clearly abused its discretion in refusing to admit the EMT's report and complainant's statement within it.

The right of a criminal defendant to present and cross-examine a complaining witness about their statement that someone else perpetrated the crime implicates the Confrontation Clause. Therefore, to determine if the Constitutional error requires reversal, *Shelby v. State*, 819 S.W.2d 544 (Tex. CIM. App.1991), provides the following factors be considered:

1) The importance of the witness' testimony;

2) Whether the testimony was cumulative;

3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;

4) The extent of cross-examination otherwise permitted; and,

5) The overall strength of the prosecution's case.[4]

These factors are analyzed in turn:

1) The statement was important as it was an admission by complainant that she had been attacked by someone other than appellant;

2) The testimony was cumulative because three letters written by appellant were admitted into evidence in which, he provided proof that he was indeed the attacker;[5]

a) In one letter to what appears to be a court official, Ms. Kathy Allen, file-stamped September 25, 1996, appellant requested information about who was to be appointed his attorney in this case. Referring to the incident, he wrote, "[it] is a domestic quarrel in which things got out of hand."

b) In an undated jailhouse letter to complainant, appellant wrote about the incident, "[y]ou and I both know I didn't intent [sic] on you being hurt. . . ."

c) In another undated jailhouse letter to complainant, appellant wrote, "I've never hurt a woman in my life, and I felt truly sorry for what I've done to you;"

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[4]*Id.* at 544-51.

[5]Appellant stipulated that he wrote the letters.

3) There was no other evidence presented to us corroborating the statement that complainant was assaulted by her husband;

4) Cross-examination was permitted in that defense counsel was able to ask complainant whether she made a statement to the EMT that her husband had attacked her. When she flatly denied this, the inquiry was ended. Therefore, without the statement in the report, cross-examination on that point was rendered less effective because appellant was denied the opportunity to confront complainant and impeach her with her own statement;

5) In spite of complainant's statement in the EMT's report, the State's case against appellant that he was the attacker was strong by virtue of appellant's letters. Appellant's own words say he, not a third party, was the attacker.

In light of these factors, I conclude beyond a reasonable doubt the erroneous exclusion of the EMT's report and complainant's statement within it did not contribute to the conviction or the punishment.[6] Therefore, I concur in the majority's result.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed October 28, 1999.

Panel consists of Justices Amide, Edelman, and Witting.

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

[6] TEX. R. APP. P.44.2(a).