In trial after discretionary transfer to adult court, no error committed by failing to instruct the jury that juvenile could not be convicted for conduct committed before his fourteenth birthday.[Eguade v. State](17-3-12B)

On July 31, 2017, the El Paso Court of Appeals found that because no evidence supported a rational inference that Appellant was not fourteen years old at the time of offenses, the trial court did not err when it failed to include a Section 8.07(a)(6) instruction to the jury.

¶ 17-3-12B. **Eguade v. State**, No. 08-15-00268-CR, --- S.W.3d ----, 2017 WL 3224863 (Tex.App.—El Paso, 7/31/2017).

**Facts:** The Eguade and De La Rosa families lived next door to each other in the San Elizario community. Appellant’s mother is L.D.R.’s godmother and according to L.D.R., the two families had a family-like relationship.

On January 31, 2010, when L.D.R. was in the fifth grade, she told her brother, Hector De La Rosa that Appellant had sexually abused her when she was getting ready to enter the first grade. Hector immediately told their mother, who called the police. El Paso Sheriff’s Deputy Sergio Juarez responded to the call at the De La Rosa residence and created an initial report which he turned over to a detective for further investigation. On February 9, 2010, Detective Joe Zimmerly interviewed L.D.R. at a child advocacy center.

At the time of trial, L.D.R. was sixteen years old and a sophomore in high school. She testified that Appellant raped her when she was five years old, going into the first grade at Borrego Elementary, and her teacher during this time was Mrs. De Leon. L.D.R. related that the first time occurred at Appellant’s house in his mother’s bathroom. When L.D.R. went to use the bathroom, Appellant was at the door when she was finished. He touched her, pulled down his shorts, and inserted his penis into her vagina while she was lying on her back on the floor. While she and Appellant were in the bathroom, Appellant’s sister knocked on the door and Appellant told L.D.R. to be quiet. When he left, he told her to stay in the bathroom for a while.

The next occasion occurred in the Eguade’s hallway bathroom. Again, she went to the bathroom and Appellant was waiting for her at the door when she was finished. He put his penis in her vagina, and then he sat down on the toilet and forced L.D.R. to put her mouth on his penis by putting his hand on the back of her neck. She testified that she saw a white substance come out of his penis. L.D.R. never told anyone because once she learned that what had happened was wrong, she felt guilty and was afraid that the two families would part ways.

On cross-examination, L.D.R. testified that she felt pain, but did not remember whether she bled. One of the reasons she never told anyone was because Appellant made her feel as though it was her fault. Even after her mother learned of the abuse, L.D.R. did not speak extensively because she does not like talking about what happened. After she made her outcry, no other incidents occurred.

The State rested its case and moved to dismiss Count II given that there was no evidence regarding anal penetration. Appellant moved for directed verdicts on Counts I and III, which the trial court denied.

Mrs. De La Rosa testified as the first defense witness. On January 31, 2010, Deputy Juarez responded to her call and she informed him of L.D.R.’s outcry. Mrs. De La Rosa began taking L.D.R. to counseling because she was having emotional problems and difficulty at night. She did not recall informing law enforcement officials that L.D.R.’s abuse occurred during mutual cookouts with the Eguades. She also did not remember giving officers the five dates of occurrence for the abuse, but did recall that the two families spent significant time together, including traveling together.

On cross-examination, Mrs. De La Rosa explained that she had known the Eguade family for 25 years, and that before the abuse, the two families were extremely close. L.D.R. is shy, suffers from weight problems, and becomes very angry whenever she has to talk about the abuse. L.D.R.’s outcry made her feel helpless and angry. She then recalled that she did in fact give law enforcement the dates of abuse which were an approximation because the child was too young to give precise dates. Mrs. De La Rosa remembered that L.D.R. told her she was around five or six years old when the events at issue occurred.

Detective Gil, a twenty-one year veteran of the sheriff’s department, testified that she took Mrs. De La Rosa’s and Hector’s statements in 2010 after L.D.R. made her outcry. She did not recall reading the statement back to Mrs. De La Rosa, but explained that Mrs. De La Rosa initialed each paragraph in her statement to verify its contents.

L.D.R.’s counselor, Martha Dominguez, testified that she had seen L.D.R. approximately nineteen times. She observed that L.D.R. was generally a happy person, and during counseling, Dominguez helped her focus on reducing the anxiety she experienced about having to testify. L.D.R. only opened up to her once concerning the abuse. Dominguez has thirty years of practice as a licensed social worker and has treated approximately three hundred sex-abuse victims. She opined that family support is one the most important factors in how a child copes with sexual abuse. She also indicated that during her time with L.D.R., she never recanted her statement.

Mrs. Eguade testified that she was aware of the charges against her son and confirmed that he was fourteen years old at the time and L.D.R. was five years old. As L.D.R.’s godmother, she cared for L.D.R., but she never noticed that anything was bothering the child. On cross-examination, she minimized her family’s relationship with the De La Rosas. They rarely went to each other’s homes and when the De La Rosas did come over, they stayed outside. She acknowledged that L.D.R. had been at her home while Appellant was present. When Appellant was much younger, she supervised him but was unable to monitor him all of the time and it was impossible for her to know everything that he did outside of her presence. She acknowledged the seriousness of the charges and while she would do anything for her son, she would not lie.

Finally, Appellant testified. At the time of trial, he was twenty-five years old. He claimed that L.D.R. was lying, he would never abuse her, and he was never alone with her. Initially, Appellant attended Texas A & M University on scholarship, but he returned to El Paso after losing the scholarship due to low grades. He was placed on academic suspension at El Paso Community College and was finishing his engineering degree at The University of Texas at El Paso. He had lost two jobs and was unable to join the Air Force because of his pending charges.

**Held:** Affirmed.

**Opinion:** Appellant complains that the trial court committed erred by failing to instruct the jury that he could not be convicted for conduct committed before his fourteenth birthday pursuant to Section 8.07(a)(6) of the Texas Penal Code. We disagree.

Appellate courts review charge error under a two-pronged test. Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984). First, we must determine whether error exists; second, if error exists, we then must evaluate the harm caused by the error. Ngo v. State, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005). The degree of harm required for reversal depends on whether the error was preserved at trial. Almanza, 686 S.W.2d at 171; Neal v. State, 256 S.W.3d 264, 278 (Tex.Crim.App. 2008). If the error was preserved, we review for “some harm” whereas unpreserved errors are reversible only for egregious harm. Almanza, 686 S.W.2d at 171. Appellant acknowledges that he did not object at trial. Therefore, we reverse only for egregious harm. Alamanza, 686 S.W.2d at 171. An egregious harm determination must be based on a finding of action rather than theoretical harm. See Cosio v. State, 353 S.W.3d 766, 777 (Tex.Crim.App. 2010). For harm to be egregious, the error must have affected the very basis of the case, deprived Appellant of a valuable right, or vitally affected a defensive theory. Id.

Article 36.14 of the Texas Code of Criminal Procedure details the requirements and procedures for the delivery of the court’s charge to the jury. TEX.CODE CRIM.PROC.ANN. art. 36.14 (West 2007). “[The] judge shall ... deliver to the jury ... a written charge distinctly setting forth the law applicable to the case.” Id. A judge has a duty to instruct the jury on the law applicable to the case at hand even when defense counsel fails to object to inclusions or exclusions in the charge. Taylor v. State, 332 S.W.3d 483, 486 (Tex.Crim.App. 2011). Appellant contends that Section 8.07(a)(6) of the Texas Penal Code was applicable. Section 8.07(a) provides that a person may not be prosecuted for or convicted of any offense that the person committed when younger than fifteen years of age. See TEX.PEN.CODE ANN. § 8.07(a)(West Supp. 2016). However, the exception contained in Section 8.07(a)(6) permits a person fourteen or older to be convicted if the person committed a first-degree felony and the juvenile is transferred pursuant to Section 54.02 of the Texas Family Code. Id. at § 8.07(a)(6). Appellant asserts that the trial court committed egregious error by failing to include a Section 8.07(a)(6) instruction informing the jury that it was not permitted to convict Appellant if it did not find that he was fourteen years or older when the offenses were committed. He relies upon Taylor v. State, 332 S.W.3d 483, 486 (Tex.Crim.App. 2011), to support his argument. The defendant in Taylor was charged by three separate indictments with aggravated sexual assault. Id. at 485. The complainant testified to sexually assaultive conduct committed by the defendant both before and after the defendant’s seventeenth birthday. Id. at 485–86. Although the indictments alleged the offenses were committed on dates that followed the defendant’s seventeenth birthday, the charge instructed the jurors that the State was not bound by the specific dates alleged and that they could convict the defendant if the offenses were committed at any time within the period of limitations. Id. at 487–88. Further, the charge did not contain a Section 8.07(b) instruction; that is, the jurors were not told that the defendant could not be convicted for conduct committed before his seventeenth birthday. Id. at 486; see TEX.PEN.CODE ANN. § 8.07(b).

The court of criminal appeals found that, under the circumstances, Section 8.07(b) was law applicable to the case on which the trial court had a duty to instruct the jury even in the absence of a request or objection by the defendant. Taylor, 332 S.W.3d at 488–49. The Taylor court concluded “that a jury charge is erroneous if it presents the jury with a much broader chronological perimeter than is permitted by law.” Id. at 488. The court thus held that the absence of a Section 8.07(b) instruction, when combined with evidence of the defendant’s conduct while he was a juvenile and the instruction that a conviction could be based on any conduct within the limitations period, “resulted in inaccurate charges that omitted an important portion of the law applicable to the case.” Id. at 489.

In response, the State directs our attention to Randall v. State, Nos. 09–13–00322–CR, 09–13–00323–CR, 09–13–00324–CR, 09–13–00325–CR, 2015 WL 1360115, at \*1 (Tex.App.–Beaumont Mar. 25, 2015, no pet.)(not designation for publication), for comparison. In Randall, the appellant similarly argued that by failing to instruct the jury that he could not be prosecuted or convicted for any offenses that he committed before attaining the age of fourteen, the jury was improperly allowed to use the evidence of his delinquent conduct to find him guilty of the crimes with which he was charged in the indictment. Id. The jury in Randall also heard testimony that appellant engaged in sexual misconduct before his fourteenth birthday and the Beaumont court held it was error for the trial court to have omitted the 8.07(a)(6) instruction. Id. at \*2. However, after reviewing the testimony, the arguments of counsel, and the charge as a whole, the Randall court ultimately held that while charge error occurred, the trial court’s failure to include the instruction did not cause any egregious harm because all of the evidence and other information in the record made it clear to the jury that it was required to find that the conduct relevant to the crimes occurred after the appellant turned fourteen years old. Id. at \*3.

We find both Taylor and Randall distinguishable. In Taylor, the absence of a Section 8.07(b) instruction was “problematic” where the jury “received evidence upon which they were statutorily prohibited from convicting Appellant,” i.e., “repeated testimony regarding Appellant’s pre-seventeen conduct.” Id. at 487. Similarly, in Randall, there was also extensive evidence presented to jury that appellant engaged in sexual misconduct prior to his fourteenth birthday. Randall, 2015 WL 1360115, at \*2.

No such evidence exists here. L.D.R.’s testimony concerning her abuse focused on two incidents that she was certain occurred when she entered the first grade at Borrego Elementary and her teacher was Mrs. DeLeon. Her school records established that this time period coincided with the 2005–06 school year, placing Appellant over fourteen years old based on his November 6, 1989, birthdate. See Several other witnesses, including Appellant himself, testified that at the time of the alleged offenses, Appellant was fourteen or fifteen years old. Moreover, even though L.D.R. testified that she was five years old when the abuse occurred, her testimony that she was entering the first grade, coupled with her school records, reflect that her age at the time of the incidents would be closer to six years old instead of five. In fact, Appellant’s entire defense focuses on incidents already detailed in the juvenile transfer order and that had occurred after Appellant had already turned fourteen years of age.

Additionally, he trial court was aware that Appellant was only prepared to defend against the 2005 allegations set out in the juvenile transfer order and contained in the State’s file because he initially objected to the lack of information contained in the State’s file regarding a 2003 act detailed in the State’s notice of extraneous offenses. Appellant’s counsel informed the trial court that after reviewing the State’s file, only allegations from 2005 forward were at issue. The State confirmed that it had no information regarding any 2003 allegations and no intentions of introducing such evidence. The State again assured the trial court that its case would focus on the acts that occurred in 2005 despite the 2003 indictment date.

**Conclusion:** Because no evidence supports a rational inference that Appellant was not fourteen years old at the time of offenses, the trial court did not err when it failed to include a Section 8.07(a)(6) instruction to the jury. We overrule Issue Two. Judgment Affirmed.