During punishment phase of trial, trial court’s failure to sua sponte instruct the jury on the proper burden of proof for extraneous offenses and bad acts was considered error. [Smith v. State](17-4-6).

On August 24, 2017, the Houston Court of Appeals (1st Dist.) held that, while the trial court bears the responsibility to instruct a jury on the proper burden of proof for extraneous offenses, and the defendant is not required to request the instruction or object to its omission to preserve a claim, here the trial court’s failure to provide the reasonable-doubt instruction was not so egregious that appellant was denied a fair and impartial trial (no reversible error).

¶ 17-4-6. **Smith v. State**, No. 01-15-00841-CR, 2017 WL 3634247 [Tex.App.—Houston (1st Dist.), 8/24/2017].

**Facts:** During the new punishment hearing, Ned White, a maintenance man and resident at the Apache Springs apartment complex, testified that on May 30, 2009, he saw, while walking through the apartment complex, the complainant, Daniel Sepeda, and the complainant’s younger brother, Gregory Ramos, washing the complainant’s car near the dumpster. After speaking with the complainant and Ramos, White returned to his friend’s apartment to sit outside and watch television. While sitting in a breezeway, White saw two “young black guys” walk past him and into the apartment complex’s parking lot. One of the men was wearing a blue bandana, while the other man was putting his bandana on as they walked past White. About thirty minutes later, White heard one or two gunshots and ran inside his friend’s apartment. As White looked out the apartment’s window, he saw “two young black guys” holding firearms and running. White then exited his friend’s apartment, ran toward the dumpster, and saw the complainant lying on the ground. bleeding extensively from his throat and face.

Ramos testified that on May 30, 2009, when he was eleven years old, he helped the complainant wash his car near the dumpster in the Apache Springs apartment complex. At one point, while they were washing the car, the complainant asked Ramos to tell Laura, his girlfriend, who lived in the apartment complex with them, “to go get his gun.” The complainant told Ramos that he had seen “two guys watching him.” A few minutes later, Laura brought the complainant his firearm, which he then put in his waistband.

As Ramos and the complainant finished washing the car, two black men began walking “side by side” toward them. When the men aggressively yelled “[h]old still,” “[d]on’t move,” or “something [of] that nature,” the complainant stood up and Ramos “eased up behind him.” (Internal quotations omitted.) The complainant then told Ramos to “get back,” and Ramos “duck[ed]” down in the backseat of the complainant’s car in order to protect himself. Subsequently, Ramos heard two gunshots, “[o]ne followed right after the other, almost at the same time.” When he looked up, he saw the two black men running away. The complainant was lying on the ground and “bleeding a lot” from his neck, and the complainant’s firearm was “missing.”

Harris County Constable’s Office (“HCCO”), Precinct 4, Deputy K. Massey, Jr. testified that on May 30, 2009, while on patrol, he was dispatched to the Apache Springs apartment complex in response to a call that “shots [had been] fired.” When he arrived at the scene, he saw the complainant, who had been shot, lying on the ground.

Houston Police Department (“HPD”) Officer T. Winn testified that on May 30, 2009, he was dispatched to the Doctors Hospital after the hospital’s staff reported a “shooting victim.” When Winn arrived at the hospital, he met with appellant, who had been shot in the shoulder, and Marquieth Jackson. Appellant told Winn that he had been outside Orlando’s, a convenience store, when a black man approached him, demanded money, shot him, and drove away in a black car.5

After speaking with appellant, Officer Winn then went to Orlando’s, but he did not find any evidence of blood, shell casings, or firearm use. While at the store, Winn spoke to the security guard, who told him that he had not seen or heard any commotion or gunshots that day. And when Winn viewed the videotape footage from the store’s security camera, he saw no evidence that a shooting had occurred.

Bobby Williams testified that on May 30, 2009, he rode in a car with his cousin, Roderick Brooks, to an apartment complex to pick up appellant. When they arrived at appellant’s apartment, he and his friend, whose name Williams did not know, got into Brooks’s car, and the four men drove to the Apache Springs apartment complex. Brooks parked the car, and appellant and his friend exited, while Williams and Brooks remained in the car. When appellant exited the car, Williams saw that he had “a little bulge” on “the back side of his kidney area.” He then saw appellant and his friend walk through a breezeway.

After about three or four minutes, Williams heard a gunshot, and “a minute later,” appellant and his friend ran up to Brooks’s car. Once appellant was inside the car, Williams saw that there was blood “coming out of [appellant’s] shirt.” Williams also saw that appellant’s friend had a firearm with him that he had not seen before. Appellant, who had a wound to his shoulder, told Williams that “some guy [had] shot him.” As Brooks drove the car out of the Apache Springs apartment complex, Williams saw “a man ... l[ying] on the ground.”

Williams explained that although he wanted to take appellant to the nearest hospital, appellant wanted to go to another hospital, the Doctors Hospital, which was “quite a ways away.” When they finally arrived at the Doctors Hospital, Williams and Brooks carried appellant inside. They then left to go home.

Williams noted that he spoke with law enforcement officers about a month after the shooting. At first, he was not “completely honest” because appellant had wanted him to say that Brooks had picked up appellant “by Orlando’s or some store like that.” Although Williams initially told the officers that Brooks had picked appellant up from Orlando’s, “two or three minutes” later, during the same interview, Williams told them the truth, namely that the four men had gone to the Apache Springs apartment complex “where [appellant] had been shot and [had] shot someone.”

Harris County Sherriff’s Office (“HCSO”) Deputy C. Pool testified that on May 30, 2009, he went to the Apache Springs apartment complex to investigate the shooting of the complainant. At the time, law enforcement officers were looking for two black males. Later on that evening, Pool spoke about the shooting with an “unidentified individual” who told him that a man named “Cornell” had “possibly [been] shot during the incident,” had been taken to a hospital, and had subsequently “gone to Atlanta, Georgia.” When Pool later returned to the scene of the shooting, he found “[a] drop of blood” belonging to appellant.6 During his investigation, Pool also discovered that on the day that the complainant had been shot, an HPD report showed that appellant had also been shot, had arrived at the Doctors Hospital, and had reported a robbery. Pool noted that appellant’s whereabouts after the shooting were initially unknown, and he was arrested in Atlanta, Georgia several months later.

Deputy Pool further opined that the shooting involving the complainant was not related to “a drug deal,” nor was it “a simple fight that had gone wrong between” appellant and the complainant. Rather, appellant and his friend had “just walked up” to the complainant in a threatening manner, and appellant and the complainant had “shot each other” at close range “simultaneously.”

Dr. Darshaw Phatak, an assistant medical examiner at the Harris County Institute of Forensic Sciences, testified that the complainant suffered a gunshot wound to his neck. He opined that the complainant had been shot by an individual standing approximately one foot to three feet away. As a result of the gunshot wound, the complainant suffered brain swelling, hemorrhages inside of the brain, epidural, subdural, and subarachnoid hemorrhages surrounding his spinal cord, blood in his respiratory tract and lungs, and a fracture to his left hyoid bone. According to Phatak, the gunshot wound was fatal and the complainant would have collapsed immediately, been unable to move his extremities because his spinal cord had been perforated, and asphyxiated because of “the hole in his respiratory tract.” Phatak opined that the cause of death was a “gunshot wound of the neck through the larynx, cervical spine, spinal cord, and into the right side of the back” and the manner of death was homicide. Phatak also noted that the complainant would have been able to shoot a firearm either before or at the same time that he sustained his injuries, but not after he had been shot.

Appellant testified that he was in a gang, and at a certain point, he began selling narcotics for his cousin, Brooks, who had given him a firearm and would “drop off drugs to [him] so [that he] could sell [them] for [Brooks] at anytime.” Whenever there was “supposed to ... be[ ] a deal done, [Brooks] would come pick [appellant] up ... and [he] would do a deal for [Brooks].”

On May 30, 2009, Brooks and Williams picked up appellant and Jackson so that appellant could “make a sale” for Brooks. Appellant explained that on that day, he was supposed to “see some girls” at the Apache Springs apartment complex in order to “drop off some marijuana.” After “mak[ing] the deal,” appellant and Jackson started walking in the apartment complex’s parking lot toward the complainant and Ramos. Jackson was walking behind appellant, who was talking to Brooks on his cellular telephone. At the time, appellant had his firearm in his back pocket. The complainant and Jackson then engaged in a confrontation and began “swinging at each other.” As appellant walked quickly toward Jackson and the complainant, the complainant “pulled out a gun” from his waistband and fired it. Appellant was hit in his right shoulder, and he, acting on “reflex,” “pulled out [his] gun and fired back” at the complainant. Appellant then ran away toward Brooks’s car. Appellant noted that at the time he shot the complainant, he knew him because of a previous “fight in the neighborhood.”

Appellant further testified that Brooks did not drive him to the nearest hospital, but instead took him to the Doctors Hospital. And it was Brooks’s idea to tell law enforcement officers that he had been shot at Orlando’s. After appellant arrived home from the hospital, his father came to pick him up, and they drove to Atlanta, Georgia.

In regard to appellant’s extraneous offenses and bad acts, HPD Sergeant J. Salazar testified that on May 14, 2009, while on patrol, he was dispatched in response to a call from Glenn Bowie, who had “observed [the] males that had robbed him the night before.” Salazar obtained a description of the suspects, i.e., “three black males,” and a description of the car that they were driving. Later that day, Salazar saw appellant driving the suspects’ car, and he initiated a traffic stop. Bowie, who had been brought to the scene of the traffic stop, then identified two of the men in the car as the ones that had robbed him. Bowie also identified appellant from a photographic array as one of the men that had robbed him, stating, “I never will forget his face. That’s him.” (Internal quotations omitted.) The State subsequently filed robbery charges against appellant.

Darren O’Neal, a juvenile probation officer for the Harris County Juvenile Probation Department, testified that in 2006, he supervised appellant while he was “on probation for assault and bodily injury and burglary of a habitat[ion] with the intent to commit theft.” O’Neal noted that during the time that appellant was under his supervision, appellant “[r]eceived a ticket and [had] some fighting issues at school.” Appellant was “suspended from [his] alternative school” because of fighting, “skipping classes,” suspicion of marijuana use, and “gang affiliation.” He also, while on probation, received a “new charge of evading arrest.” And appellant told O’Neal that he was a member of the 5–Deuce Hoover Crips gang, which O’Neal noted was “violent.”

Karol Davidson, an attorney with the Texas Youth Commission (“TYC”),7 testified that appellant spent time in two TYC facilities from April 24, 2007 to January 24, 2008. While at the TYC facilities, he was required to follow their rules which involved “not assaulting others, complying with the facility [ ] ... [and its] programming, not having contraband, [and] not disrupting the routines of the program.” Davidson explained during his 275–day stay in the facilities, appellant had a “consistent pattern of referrals” and was cited for seventy-nine disciplinary incidents. She further noted that appellant had “behavior issues.”

Former TYC Correctional Officer A. Hyman testified that she issued several citations to appellant while he was in the TYC facilities. For instance, on July 10, 2007, she cited appellant for disruption of the program and being a danger to others because he “swung at [her]” and continued to struggle with her as she attempted to restrain him. On August 7, 2007, Hyman cited appellant for disruption of the program, refusal to follow staff instructions, and being in an undesignated area. And on August 23, 2007 and November 5, 2007, Hyman cited appellant for disruption of the program, failure to abide by the dress code, and refusal to follow staff instructions.

Harris County Juvenile Justice Center Officer J. Watson testified that on March 14, 2010, another officer alerted him to a problem with appellant. Appellant “seemed to be aggravated” and “threatening someone for some reason.” Watson explained that appellant wanted to “run out of his cell” and “attack staff.” He would not calm down, did not want to hear what the officers were saying to him, and would not comply with the building supervisor’s request to sit on his bed so that his food could be delivered to him.

HCSO Deputy T. Vaughn testified that on February 5, 2011, when he was a detention officer at the Harris County Jail, he saw appellant standing in an unauthorized area, near an emergency exit, and he gave appellant a verbal warning. On February 6, 2011, he again saw appellant in the same unauthorized area. When Vaughn asked appellant to come over to him, appellant did not initially respond. When appellant did eventually walk over to Vaughn, he was agitated and “started making little threats.” Specifically, he told Vaughn: “Ima beat your ass, nigga. I’ll kill you. You better check my records. I did it before, nigga, and I’ll do it again, bitch ass nigga. Fuck you and Harris County.” (Internal quotations omitted.) Appellant continued to act aggressively toward Vaughn and verbally assaulted him. When Vaughn attempted to restrain appellant, he “jerked away,” pushed Vaughn, and struck him in his left eye with a closed fist. Vaughn felt pain in his eye, which became swollen and bruised.

Texas Department of Criminal Justice (“TDCJ”) Correctional Officer A. McCoy testified that on April 21, 2013, while working at the Holliday Unit in Huntsville, Texas, she heard someone, who she believed to be appellant, “banging on the door” in the cellblock. When McCoy told appellant to stop, he “cursed [her] out” and called her “a dumb ass bitch.” Specifically, appellant stated: “I don’t give a damn about a ho-ass case. Write it, bitch. I hate dumb ass bitches.” (Internal quotations omitted.) McCoy then cited appellant for using abusive, indecent, and vulgar language.

TDCJ Correctional Officer B. Jackson testified that on June 18, 2013, while working in the Education Department at the Holliday Unit, she asked appellant, who was in a line outside the Education Department’s building, to tuck in his shirt, pull up his pants, and move up in line. He refused to comply with the previous orders that Jackson had given him. And he, using vulgar language, told her that “he didn’t have to do a mother fucking thing” and “he had 40 years.” Jackson cited appellant for the incident.

HCSO Detention Officer D. Isbell testified that while he was working at the Harris County Jail on June 23, 2014, appellant refused to follow his instructions. Appellant then “got into an aggressive stance” and then said to Isbell and his partner that “[i]t look[ed] like someone needs an ass whooping.” (Internal quotations omitted.) He further stated: “I’m here for murder. I already caught a case for assault on one of you all. Look that shit up.” (Internal quotations omitted.) Once appellant was restrained, he continued to threaten the detention officers as they took him to a “separation cell.” Isbell then cited appellant for threatening staff and refusing to obey orders.

The trial court admitted into evidence records from the Harris County Jail Disciplinary Committee, State’s Exhibit 282,9 which show that the committee found appellant guilty of the major offense of fighting on July 22, 2010; the major offense of “poss[ession]/manuf[acturing] of any weapon” on September 5, 2010; the minor offense of refusing to obey an order on September 29, 2010; the major offense of “assault on inmate” on October 24, 2010; the major offense of “engaging in sexual acts” on December 28, 2010; the major offense of “engaging in sexual acts” on October 9, 2011; the major offense of “engaging in sexual acts” on October 22, 2011; the minor offense of “conduct which disrupts” on March 9, 2012; the major offense of threatening staff on June 23, 2014; the major offense of tampering on July 15, 2014; and the major offense of trafficking on September 20, 2014.10

The trial court also admitted into evidence appellant’s disciplinary records from the TDCJ, which document appellant’s wrongdoings and rule violations while he was in the custody of the TDCJ. The records show that appellant was found guilty of the offense of masturbation on July 12, 2012; the offense of “out of place” on July 24, 2012; the offense of failure to obey orders on August 21, 2012; the offense of failure to obey orders on September 14, 2012; the offense of “[u]sing vulgar language” on April 23, 2013; the offense of failure to obey orders on June 18, 2013; the offense of “fail[ure] to turn out for work assignment” on June 24, 2013; the offense of “[o]ut of place” on June 30, 2013; the offense of fighting on October 21, 2013; the offense of “masturbat[ion] in public” on November 20, 2013; and the offense of “masturbat[ion] in public” on December 4, 2013.

In regard to his extraneous offenses and bad acts, appellant testified that when he was in the custody of TDCJ and Harris County, he continuously “caus[ed] problems,” acted violently, and threatened the employees. Further, he stated that he did not “deny any of that” which the other witnesses had testified to about his actions while in custody. And he agreed that he had committed the offenses listed in the records of the Harris County Jail Disciplinary Committee, State’s Exhibit 282. Appellant also admitted to committing the following criminal offenses as a juvenile: “assault, bodily injury, assault, bodily injury, burglary of a habitation, possession of marijuana, evading arrest, possession of marijuana, [and] burglary of a habitation.” He further stated that he had committed infractions while he was in the custody of the TYC and Harris County. And he had committed various criminal offenses in the past. Specifically, appellant noted that while in the TYC facilities, he had been cited for seventy-nine incidents during his 275–day stay.

Appellant further acknowledged that he had been involved with a gang, the 5–Deuce Hoover Crips, since he was twelve years old, and he had committed criminal offenses with members of the gang. Although appellant did not admit to robbing Bowie, he did state that he had gotten into an altercation with Bowie. Appellant also noted that he began selling marijuana when he was fifteen or sixteen years old. And he had lied to law enforcement officers about being shot at Orlando’s. Appellant further admitted to lying under oath and noted that he was arrested in this case after he was stopped for jaywalking while he was in living Atlanta, Georgia.

In his first issue, appellant argues that the trial court erred in not sua sponte instructing the jury on the proper burden of proof for extraneous offenses and bad acts because “[t]he State introduced extraneous offense and bad acts evidence during the punishment hearing” and he was “denied a fair trial.” See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2016).

**Held:** Affirmed as Modified (The written judgment was modified because it reflected a sentence of 40 yrs when the oral pronouncement was 45 yrs.)

**Memorandum Opinion:** In regard to the admissibility of evidence of extraneous offenses and bad acts in non-capital cases during the punishment phase of trial, the Texas Code of Criminal Procedure provides, in pertinent part, as follows:

*Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. Id. (emphasis added); see also Huizar v. State, 12 S.W.3d 479, 483–84 (Tex. Crim. App. 2000) (article 37.07, section 3(a)(1) governs admissibility of evidence at punishment phase in all non-capital cases).*

While extraneous-offense and bad-act evidence is generally admissible under article 37.07, section 3(a)(1), a trier-of-fact may not consider such evidence in assessing punishment unless it first concludes beyond a reasonable doubt that the defendant committed the offenses or acts. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1); see also Huizar, 12 S.W.3d at 484; Fields v. State, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999); Burks v. State, 227 S.W.3d 138, 149–50 (Tex. App.–Houston [1st Dist.] 2006, pet. ref’d). If the trier-of-fact determines beyond a reasonable doubt that the defendant committed the extraneous offenses or bad acts, it may then use the evidence however it chooses in assessing punishment. Huizar, 12 S.W.3d at 484; Fields, 1 S.W.3d at 688.

When evidence of extraneous offenses or bad acts is admitted during the punishment phase of a trial, the trial court must instruct the jury that the evidence may only be considered if the State proves the commission of the extraneous offenses or bad acts beyond a reasonable doubt. See TEX. CRIM. PROC. CODE ANN. art. 36.14 (Vernon 2007) (trial court shall instruct jury on law applicable to case); Huizar, 12 S.W.3d at 483–84 (article 37.07, section 3(a)(1), “law applicable” in non-capital punishment cases and trial courts must sua sponte instruct juries on reasonable-doubt standard (internal quotations omitted)); Burks, 227 S.W.3d at 150 (when evidence of extraneous offenses or bad acts introduced in punishment phase of non-capital trial, trial court has independent duty to charge jury pursuant to article 37.07, section 3(a)(1)). Without a reasonable-doubt instruction contained in the trial court’s charge to the jury, the possibility exists that a “jury might apply a standard of proof less than reasonable doubt in its determination of the defendant’s connection to such offenses and bad acts, contrary to [article 37.07,] section 3(a)[ (1) ].” Huizar, 12 S.W.3d at 484. Because a trial court bears the responsibility to so instruct a jury, a defendant is not required to make an objection to preserve error, and the failure to so instruct the jury constitutes error. Huizar, 12 S.W.3d at 484; Burks, 227 S.W.3d at 150 (“The responsibility to instruct the jury lies with the trial court: the defendant is not required to request the instruction or object to its omission to preserve a claim of article 37.07, section [ ]3[ ](a)(1) error ....”).

As noted in his brief by appellant, the State introduced the following evidence of extraneous offenses and bad acts during the punishment phase of trial: the “alleged robbery of Bowie” by appellant; his prior “juvenile adjudications”; his “alleged criminal street gang membership”; and his “alleged disciplinary violations and criminal offenses while he was in the custody of various Juvenile Justice Institutions, the Harris County Sheriff’s Office, and the Texas Department of Criminal Justice.” And the trial court should have instructed the jury that it “must first find that the alleged offenses and bad acts were true beyond a reasonable doubt before [it] could consider them in assessing [his] punishment.”

Here, it is undisputed that the trial court did not provide the jury with the required reasonable-doubt instruction. Accordingly, we hold that it erred in not instructing the jury regarding the evidence of unadjudicated extraneous offenses and bad acts introduced by the State at trial.13 See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1); Huizar, 12 S.W.3d at 484; Zarco v. State, 210 S.W.3d 816, 821–23 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

In regard to harm, however, appellant did not request an article 37.07, section 3(a)(1) instruction or object to its omission from the trial court’s charge to the jury. Under such circumstances, jury charge error does not require reversal unless the record shows that it was so egregious that appellant was denied a fair and impartial trial. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); Graves v. State, 176 S.W.3d 422, 435 (Tex. App.–Houston [1st Dist.] 2004, pet. struck); see also Zarco, 210 S.W.3d at 821 (“[T]he failure to object increases [defendant]’s burden on appeal, imposing a higher hurdle [he] must overcome—namely egregious harm—before we can reverse.”). In determining the degree of harm, we look to the entire jury charge, the state of the evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. Almanza, 686 S.W.2d at 171; see also Zarco, 210 S.W.3d at 823. Appellant must show that he suffered actual rather than theoretical harm. Cosio v. State, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

During the punishment phase of trial, the State introduced evidence about the primary offense and certain unadjudicated extraneous offenses and bad acts committed by appellant. Notably, however, appellant also testified extensively about his extraneous offenses and bad acts. Specifically, he testified that while he was in the custody of TDCJ and Harris County, he continuously “caus [ed] problems,” acted violently, and threatened the employees. And he agreed that he had committed the offenses listed in the records from the Harris County Jail Disciplinary Committee, State’s Exhibit 282. Appellant also admitted to committing infractions while he was in the custody of the TYC and Harris County. And that he had committed various criminal offenses in the past. Appellant further noted that while he was in the TYC facilities, he was cited for seventy-nine incidents during his 275–day stay.

Appellant also testified that he was a member of a gang, the 5–Deuce Hoover Crips, and had committed criminal offenses with members of the gang. He also admitted to engaging in an altercation with Bowie, although he denied robbing Bowie, selling narcotics, lying to law enforcement officers, and lying under oath. See Johnson v. State, 181 S.W.3d 760, 766 (Tex. App.–Waco 2005, pet. ref’d) (“Texas courts have concluded that egregious harm has not been shown because of the omission of a reasonable doubt instruction when ... the evidence connecting the defendant to the extraneous conduct is ‘clear-cut’ ....”); see also Lopez v. State, No. 2–07–033–CR, 2008 WL 4052955, at \*1–3 (Tex. App.–Fort Worth Aug. 29, 2008, pet. ref’d) (mem. op., not designated for publication) (no egregious harm where defendant testified about his cocaine use); Moore v. State, 165 S.W.3d 118, 126 (Tex. App.–Fort Worth 2005, no pet.) (no egregious harm where defendant testified on direct examination to his narcotics use and “drunk driving”).

Additionally, although the State, during its closing argument, certainly discussed certain unadjudicated extraneous offenses and bad acts committed by appellant, appellant’s counsel, during his closing argument, repeatedly referenced such evidence as well. For instance, appellant’s counsel told the jury that appellant had “commit[ted] a whole lot of offenses” since the age of twelve years old and he had seventy-nine “disciplinary issues” while in the custody of TYC. He acknowledged that appellant had committed the major offense of trafficking while in the Harris County Jail. He also stated that appellant did not deny that he had sold narcotics or that he was involved in a gang. And appellant’s counsel noted that appellant had lied and fought while in jail.

In regard to the trial court’s charge to the jury, although the trial court did not to instruct the jury that it could not consider evidence of extraneous offenses or bad acts unless proven beyond a reasonable doubt, the charge did include an instruction that “[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.”14 See Gonzalez v. State, No. 13–15–00166–CR, 2016 WL 2854288, at \*5–6 (Tex. App.–Corpus Christi July 6, 2016, no pet.) (mem. op., not designated for publication); Garcia v. State, No. 01–08–00057–CR, 2009 WL 566523, at \*1–3 (Tex. App.–Houston [1st Dist.] Mar. 5, 2009, pet. ref’d) (mem. op., not designated for publication) (although jury charge on punishment did not contain instruction on burden of proof for extraneous offense, it did contain general instruction “[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant” (internal quotations omitted)); Escovedo v. State, 902 S.W.2d 109, 114 (Tex. App.–Houston [1st Dist.] 1995, pet. ref’d) (jury charge included instruction “[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant” (internal quotations omitted)). Further, during voir dire, the trial court explained to the jury:

*[I]f there are other things that the State wishes to prove ... to make [the] assessment of punishment go up or down, they have to prove those things to [the jury] ... beyond a reasonable doubt, okay? If there is another instance for which—that they want [the jury] to consider, which [it is] allowed to consider when assessing the punishment for the murder, they have to prove that other instance beyond a reasonable doubt.... The State still has a legal obligation to prove to [the jury] anything they bring to [it] in the punishment phase of the trial that will be important when ... assessing punishment, they have to prove those things beyond a reasonable doubt.*

See Tucker v. State, 456 S.W.3d 194, 213 (Tex. App.–San Antonio 2014, pet. ref’d) (during voir dire “prosecutor told the jury that the burden never shifted to the defendant and the State had to prove its case beyond a reasonable doubt”).

Finally, we note that the State did not seek the maximum punishment available and the punishment assessed by the jury is well below that which the State had requested and the maximum sentence allowed by law.15 See Johnson, 181 S.W.3d at 766 (“Texas courts have concluded that egregious harm has not been shown because of the omission of a reasonable doubt instruction when ... the punishment assessed is at the low end or in the middle of the available punishment range and/or significantly less than sought by the prosecution ....”); Graves, 176 S.W.3d at 435–36 (error not harmful where State discussed extraneous offenses during closing argument, but did not seek, and jury did not assess, maximum punishment); Tabor v. State, 88 S.W.3d 783, 788–89 (Tex. App.–Tyler 2002, no pet.) (court’s failure to sua sponte give reasonable-doubt instruction about extraneous offenses offered during punishment phase harmless error because sentence imposed was well within punishment range and State asked for greater sentence). Here, the jury assessed appellant’s punishment at confinement for forty-five years, and it did not impose a fine. Cf. TEX. PENAL CODE ANN. § 12.32(a)–(b) (Vernon 2011).

**Conclusion:** After reviewing the record in this case in its totality, we hold that the trial court’s failure to provide the jury with an article 37.07, section 3(a)(1) reasonable-doubt instruction did not deprive appellant of a fair and impartial punishment hearing. We overrule appellant’s first issue.