**Affirmed and Opinion Filed July 24, 2020**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

**No. 05-18-01263-CR**
**No. 05-18-01264-CR**

**CHRISTOPHER EUGENE ADDISON, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the Criminal District Court No. 3**
**Dallas County, Texas**
**Trial Court Cause Nos. F17-76577-J and F17-76578-J**

# MEMORANDUM OPINION

Before Justices Partida-Kipness, Nowell, and Evans
Opinion by Justice Partida-Kipness

Christopher Eugene Addison appeals his conviction on two counts of aggravated sexual assault of a child younger than fourteen for which he was sentenced to eighteen years' incarceration for each offense. In two issues, Addison asserts the trial court erred by overruling his objection to the State's closing argument and incorrectly instructing the jury on parole eligibility. We overrule both issues and affirm the judgment.

## BACKGROUND

Addison was indicted and tried on three charges of aggravated sexual assault of the same child, T.W., who was under the age of fourteen at the time of the alleged offenses. Addison pleaded not guilty to all three charges. The jury convicted him as charged in two cases and acquitted him in the third case. The jury set punishment at confinement for eighteen years in each of the two cases upon which they convicted him. The trial court's judgments set the sentences to run concurrently. Following entry of judgment, Addison filed motions for new trial, which were overruled by operation of law. This appeal followed.

## ANALYSIS

Addison brings two issues on appeal. First, he contends he is entitled to a new trial because the trial court overruled his objections to what he maintains was the State's improper jury argument during the guilt-innocence phase of trial. Second, Addison argues he is entitled to a new punishment hearing because he suffered egregious harm as the result of the trial court's erroneous instructions on parole eligibility. Addison does not challenge the sufficiency of the evidence to support the judgment. We will address each issue in turn.

### A. Prosecutorial Argument

In his first issue, Addison contends the prosecutor made improper statements during closing argument in the guilt-innocence phase of trial that struck at him over the shoulders of his counsel. His complaint stems from the following comments

made by the prosecutor during the State's rebuttal argument, which concern defense counsel's questioning of T.W. and her demeanor on the stand:

> But I ask you to look at the evidence that you actually have in front of you. You saw [T.W.]. She sat there. She couldn't look at him. She answered his questions the same way she answered mine, except that he was trying to confuse her and he did. He revictimized her by asking her a bunch of confusing questions and trying to make her repeat herself.

Addison's counsel objected "to [the prosecutor] striking at defendant over the shoulders of defense counsel." The trial court overruled the objection.

On appeal, Addison maintains the prosecutor's argument was unwarranted, inflammatory, prejudicial, and "bolstered" T.W.'s credibility by allowing the jury "to consider in its deliberations that appellant through the actions of his counsel had 'revictimized' the complainant." The State responds that the prosecutor's statements were proper because they were in response to the following statements made by defense counsel during his closing argument, which the State argues were used to attack T.W.'s credibility by suggesting her demeanor during cross-examination showed she was either lying, hiding something, or changing her story:

> Now, you heard from some -- you heard from all the witnesses we got. Now, everybody feels so sorry for [T.W.], okay? Okay. She's a kid. She's a very mature, sophisticated kid, all right? You heard several people come in here and say that's not who she really is. That's how she is in here.
>
> Now, I submit to you she is -- they said she didn't wanna look over here because she didn't wanna look at Mr. Addison. I submit to you she didn't want to look at him because she knew she was telling a lie and

> she kept telling it. But how do you know that? Because the story has changed over and over and over.
>
> ***
>
> Now, I kept asking. And I was trying to be easy with her. Y'all know I can get crummy sometimes. But I tried to be easy, make it nice enough to where she'd be comfortable enough to talk with me. But she answered their questions pretty darn easy, you remember.
>
> But she sure didn't answer my questions. Because I knew in my heart of hearts when she couldn't look me in the eye, that there's a reason for that. When someone can't look you in the eye and talk to you, they're either lying or they've got something to hide. That's just normal nature. You have kids. You have workers, people you work with that look off and won't talk to you and look you in the face. That's because they've got something to hide as a general rule. It's a reasonable deduction from the evidence.

The State maintains that Addison's counsel invited a response and, as such, the prosecutor's argument was proper. We agree.

The trial court's ruling on an objection to improper jury argument is reviewed for an abuse of discretion. *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004); *Whitney v. State*, 396 S.W.3d 696, 705 (Tex. App.—Fort Worth 2013, pet. ref'd); *Lemon v. State*, 298 S.W.3d 705, 707 (Tex. App.—San Antonio 2009, pet. ref'd). Proper jury argument generally falls within one of four areas: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) answers to opposing counsel's argument, and (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011); *see also Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987) (noting "a response to the argument of opposing counsel or invited argument" is an appropriate category of argument). To determine

if a party's argument falls into one of these categories, we must consider the argument in light of the entire record. *Magana v. State*, 177 S.W.3d 670, 674 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

"When a prosecutor makes uninvited and unsubstantiated accusations of improper conduct directed toward a defendant's attorney, in an attempt to prejudice the jury against the defendant, courts refer to this as striking a defendant over the shoulders of his counsel." *Phillips v. State*, 130 S.W.3d 343, 355 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006). A prosecutor risks improperly striking at a defendant over the shoulders of counsel when the argument "is made in terms of defense counsel personally and when the argument explicitly impugns defense counsel's character." *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1988) (op. on reh'g); *Davis v. State*, 268 S.W.3d 683, 712 (Tex. App.—Fort Worth 2008, pet. ref'd). "This prohibition protects the defendant from improper prosecutorial character attacks on defense counsel." *Whitney*, 396 S.W.3d at 704. "For an improper jury argument to mandate reversal, it must be extreme, violate a mandatory statute, or inject new facts into the record." *Castillo Alvarado v. State*, No. 05-19-00115-CR, 2020 WL 1181487, at *2 (Tex. App.—Dallas Mar. 12, 2020, no pet.) (mem. op., not designated for publication).

For example, a prosecutor impermissibly strikes at a defendant over counsel's shoulders when the prosecutor argues that defense counsel manufactured evidence, suborned perjury, accepted stolen money, or represented criminals. *Phillips*, 130

S.W.3d at 355. If the defense counsel invites argument, however, then it is appropriate for the State to respond. *See, e.g., Lewis v. State*, 676 S.W.2d 136, 143 (Tex. Crim. App. 1984) (defense counsel's argument that the prosecutors were not seeking the truth and knew "their case stinks" invited the State's reply that the prosecutors have a legal duty to see that justice is done but defense counsel is "under no such duty"); *Manzanarez v. State*, No. 05-07-01634-CR, 2009 WL 153486, at *3 (Tex. App.—Dallas Jan. 23, 2009, pet. ref'd) (mem. op., not designated for publication) (defense counsel's argument disparaging the State's case and calling the investigation shameful invited the State's reply that "[t]he only thing shameful about his trial is the way the defense lawyer has acted when he doesn't follow the rules of the court that every lawyer has to follow. And also of this man here's actions."); *Davis*, 268 S.W.3d at 713 (prosecutor properly answered argument of opposing counsel by stating the idea that the victim was armed was a "machination[ ] [of] the defense attorney" and then emphasizing that there was no evidence presented to support such a claim); *Swarb v. State*, 125 S.W.3d 672, 686 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (State's rebuttal argument that defense counsel used a "classic defense technique" of "[w]hen they can't convince you, they try to confuse you" was proper and in response to defense counsel's argument that the State merely threw mud against the wall to make its case).

We conclude the complained-of arguments by the prosecutor in this case did not impermissibly strike at Addison over the shoulders of his counsel. The

prosecutor did not attack counsel's character or accuse counsel of any wrongdoing or impropriety. Rather, the complained-of jury argument was a response to defense counsel's argument accusing T.W. of lying and his attempt to support that accusation by suggesting that T.W.'s demeanor toward counsel during cross-examination illustrated her deceit. The State's argument on rebuttal merely responded to those accusations and offered an alternative explanation for T.W.'s demeanor on the stand. Because Addison's counsel invited the argument, it was appropriate for the State to respond, and no reversible error is shown.

We, therefore, conclude the trial court did not abuse its discretion in overruling Addison's objection. Because there is no error, we need not conduct a harm analysis. *Brown v. State*, No. 05-05-01717-CR, 2006 WL 3020417, at *3 (Tex. App.—Dallas Oct. 25, 2006, no pet.) (mem. op., not designated for publication) (citing *Hawkins v. State*, 135 S.W.3d 72, 76 (Tex. Crim. App. 2004) ("A harm analysis is employed only when there is error, and ordinarily, error occurs only when the trial court makes a mistake.")). We overrule Addison's first issue.

**B. Charge Error**

In his second issue, Addison contends the parole eligibility instruction included in the punishment charge was fundamentally defective because it included language not permitted by statute. Under certain circumstances, the Texas Code of Criminal Procedure requires the trial court to include a jury instruction on parole eligibility and "good conduct time" when the jury assesses punishment. TEX. CODE

CRIM. PROC. art. 37.07, § 4(a); *Luquis v. State*, 72 S.W.3d 355, 363 (Tex. Crim. App. 2002). The statute sets out the following required language for the instruction:

> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less.

TEX. CODE CRIM. PROC. art. 37.07 § 4(a); *Luqis*, 72 S.W.3d at 363 (noting the language included in the statute is set out verbatim, is mandatory, and may not be deviated from in a court's charge).

Here, the punishment phase jury charge included the following instruction regarding parole eligibility:

> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served **plus any good conduct time earned equals half** of the sentence imposed or 30 years, whichever is less, **without consideration of any good conduct time he may earn.**

(emphasis added). The language emphasized above is not included in the statutorily required language set out in article 37.07 § 4(a). Addison does not complain that the parole eligibly instruction was included in the charge. Rather, he maintains that the inclusion of the additional references to "good conduct time" not required by section 4(a) resulted in a confusing and conflicting charge that instructed the jury that he would become eligible for parole earlier than allowed by law.

Because the charge included language not delineated in section 4(a), it was erroneous. *See Soza v. State*, No. 05-17-00590-CR, 2018 WL 3387249, at *1, n. 1

(Tex. App.—Dallas July 12, 2018, no pet.) (mem. op., not designated for publication) ("The statutory instruction is constitutional and mandatory, and the precise language of article 37.07 is prohibited from alteration.") (citing *Luquis*, 72 S.W.3d at 363). Addison did not, however, object to the jury charge below. When a defendant fails to object or states that he has no objection to the charge, we will not reverse for jury-charge error unless the record shows "egregious harm" to the defendant. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); *Almanza*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (to obtain reversal, the error must be egregious such that the defendant was deprived of a fair and impartial trial).

"[J]ury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006); *see also Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (stressing the extraordinary harm necessary to support a finding of egregious harm). Neither party bears the burden on appeal to show harm or lack thereof under this standard. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016). Instead, courts are required to examine the relevant portions of the entire record to determine whether appellant suffered actual harm, as opposed to theoretical harm, as a result of the error. *Id.*; *Almanza*, 686 S.W.2d at 174. In examining the record to determine whether such harm occurred, we consider the four *Almanza* factors: (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of probative

evidence, (3) the argument of counsel and (4) any other relevant information revealed by the record of the trial court as a whole. *Almanza*, 686 S.W.2d at 171; *Hernandez v. State*, No. 05-18-00172-CR, 2019 WL 3543576, at *4 (Tex. App.—Dallas Aug. 5, 2019, pet. ref'd) (mem. op., not designated for publication).

Addison does not identify any actual harm suffered as a result of the additional language in the instruction. Instead, he states that "there is no way to gauge the harm engendered by" the instruction because "there is no way to determine which instruction was dispositive to the jury in the sentence assessed." Applying the *Almanza* factors, we conclude the record shows that Addison suffered no egregious harm here.

First, the charge as a whole mitigates against the finding of egregious harm. The over-arching purpose of the section 4(a) instruction is to inform jurors of the concepts of "good conduct time" and parole "as a general proposition, but to prohibit the jury from using its notions of parole or 'good conduct time' in any calculus in assessing the appropriate punishment." *Luquis*, 72 S.W.3d at 360. Here, the jury was instructed not to consider how parole eligibility or good conduct time might apply to Addison when assessing punishment. Absent any evidence or other record indications to the contrary, we presume the jurors understood and followed the trial court's instructions in the jury charge. *See Taylor v. State*, 332 S.W.3d 483, 492 (Tex. Crim. App. 2011). The record shows that the jury did not send out any notes or questions expressing confusion about the parole instruction or indicating the

possible application of good conduct time or the parole law to Addison, and nothing in the record "suggests that the jury discussed, considered or tried to apply (despite the judicial admonition not to apply) what they were told about good conduct time and parole." *See Duenas v. State*, No. 05-14-00192-CR, 2015 WL 1243345, at *8 (Tex. App.—Dallas Mar. 16, 2015, no pet.) (mem. op., not designated for publication). Addison has presented no contrary evidence. Thus, the first *Almanza* factor does not weigh in favor of concluding he was egregiously harmed by the erroneous instruction.

With respect to the second *Almanza* factor—the state of the evidence—Addison does not contend the evidence was insufficient to find him guilty of the offenses of aggravated sexual assault for which he was convicted. The punishment range for those offenses was a term of life imprisonment or five to ninety-nine years and a possible fine not to exceed $10,000. TEX. PENAL CODE § 12.32(a). The jury assessed punishment at eighteen years' confinement and assessed no fine. That sentence falls well below the possible life sentence the State encouraged the jury to assess against Addison and is only three years more than the fifteen-year sentence Addison's counsel described as a "reasonable" sentence to impose during closing argument. *See Lopez v. State*, 314 S.W.3d 70, 73 (Tex. App.—Waco 2010, no pet.) (considering severity of sentencing in determining whether appellant was egregiously harmed by erroneous parole law instruction). This factor does not weigh

in favor of concluding Addison was egregiously harmed by the erroneous instruction.

The third *Almanza* factor pertains to the arguments of counsel. *Almanza*, 686 S.W.2d at 171. Neither the State nor defense counsel requested that the jury consider the possibility of parole in assessing Addison's punishment. *See Luquis*, 72 S.W.3d at 367 (noting neither counsel discussed good conduct time in argument or urged jury to assess greater (or lesser) sentence based upon any potential good conduct time credit); *Atkinson v. State*, 107 S.W.3d 856, 860 (Tex. App.—Dallas 2003, no pet.) (considering whether the State or appellant mentioned possibility of parole in argument in determining whether appellant was egregiously harmed by erroneous parole law instruction). The third *Almanza* factor does not weigh in favor of concluding Addison was egregiously harmed by the erroneous instruction.

The fourth *Almanza* factor requires that we consider any other relevant information revealed by the record of the trial as a whole that would have a bearing on whether appellant suffered egregious harm. *Almanza*, 686 S.W.2d at 171. At the time the jury considered punishment, it had already convicted Addison on two counts of aggravated sexual assault of a child under the age of fourteen, and the punishment phase jury charge set forth the proper range of punishment for the offenses. During the jury's deliberations on punishment, there was no communication between the jury and the judge regarding the parole instruction or the possible application of parole law to appellant. Nothing in the record suggests

the jury discussed, considered, or attempted to apply any aspect of parole law to Addison despite the charge's admonition not to do so. The punishment assessed is at low end of the possible range of punishment despite the State's call for the jury to impose a life sentence on Addison as punishment for sexually assaulting T.W. and allegedly transmitting HIV to her in the process. This factor weighs against Addison's contention that he was egregiously harmed by the erroneous instruction.

Under the standards necessary to show egregious harm, we conclude the erroneous parole eligibility instruction did not deprive Addison of a fair and impartial trial or affect the very basis of the case, deprive him of a valuable right, or vitally affect a defensive theory. Based on our review of the entire record, we conclude Addison was not egregiously harmed by the jury charge error. Accordingly, we resolve Addison's second issue against him.

## CONCLUSION

We conclude the trial court did not abuse its discretion by overruling Addison's objection to the State's closing argument. We further conclude Addison did not suffer egregious harm from the trial court's instruction on parole eligibility.

Accordingly, we affirm the trial court's judgments.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| CHRISTOPHER EUGENE ADDISON, Appellant | On Appeal from the Criminal District Court No. 3, Dallas County, Texas Trial Court Cause No. F17-76577-J. |
| No. 05-18-01263-CR V. | Opinion delivered by Justice Partida-Kipness. Justices Nowell and Evans participating. |
| THE STATE OF TEXAS, Appellee | |

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 24th day of July, 2020.

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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|---|---|
| CHRISTOPHER EUGENE ADDISON, Appellant | On Appeal from the Criminal District Court No. 3, Dallas County, Texas Trial Court Cause No. F17-76578-J. |
| No. 05-18-01264-CR V. | Opinion delivered by Justice Partida-Kipness. Justices Nowell and Evans participating. |
| THE STATE OF TEXAS, Appellee | |

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 24th day of July, 2020.