Opinion filed August 17, 2017

In The

Eleventh Court of Appeals

Nos. 11-15-00126-CR & 11-15-00127-CR

ROBERT DEMISON, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 91st District Court
Eastland County, Texas
Trial Court Cause Nos. 23622 & 23623

M E M O R A N D U M O P I N I O N

The jury convicted Robert Demison, III of aggravated assault with a deadly weapon and assault against a public servant. The jury found one enhancement paragraph to be true and assessed punishment at seventy years' confinement for the aggravated-assault conviction and twenty years' confinement for the assault-against-a-public-servant conviction. The jury also assessed a fine of $5,000 in each cause. The trial court ordered that the sentences were to run concurrently. Appellant

presents six identical points of error for each case on appeal. We affirm in part and reverse and remand in part.

Appellant was an inmate in the Eastland County Jail. On June 14, 2014, Aaron Blake Carper, a jailer at the Eastland County Jail, opened Appellant's cell to give him cleaning supplies, and Appellant stepped out and struck Carper on and around his head. Carper suffered a laceration to his neck, and Appellant also punctured Carper's shirt.

On July 1, 2014, Cecil Anthony Flores, a trusty at the jail, served breakfast to inmates under the supervision of Michael Shreve, a jailer at the Eastland County Jail. Shreve opened the slot to Appellant's cell. As Flores placed the food tray onto the slot, Appellant made a swinging motion at Flores and caught Flores's right index finger with a sharp object. Flores sustained a cut on his finger.

In Appellant's first and second points of error, he argues that the trial court violated his constitutional rights when it required Appellant to wear "jail garb" and to be shackled and restrained during trial. At a pretrial conference, the trial judge explained that the court "certainly would -- It's the court's preference that [Appellant] be before the jury in street clothes, rather than in clothing furnished by the Eastland County Jail." At trial, before the jury was brought in, the following exchange happened between the trial judge, Appellant, and defense counsel:

> THE COURT: Mr. Demison, you're wearing jail clothes. Is that your choice?
>
> [APPELLANT]: Nope.
>
> THE COURT: It's not? Would you like to change into street clothes?
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> [APPELLANT]: Nope. I don't want these people touching me. These people are trying to kill me.

THE COURT: So, it's your election to wear jail clothes today?

[APPELLANT]: I don't want these people touching me. I don't want these people around me. I don't want these people touching me. They done already did enough to me.

. . . .

THE COURT: Let me ask you, you have had the opportunity to visit with [Appellant] privately in the back, and you did explain to him why he should be in street clothes; is that correct?

[APPELLANT]: This is the first time I talked to this man in the whole year. For the record, this is the first time I talked to this man in the whole year.

. . . .

[DEFENSE COUNSEL]: Yes, Your Honor. He does not wish to wear the clothing.

"When a trial court forces a defendant to appear at trial in jail clothes, it might thereby impinge upon the presumption of innocence afforded to an accused." *Calamaco v. State*, 462 S.W.3d 587, 597 (Tex. App.—Eastland 2015, pet. ref'd) (citing *Lantrip v. State*, 336 S.W.3d 343, 351 (Tex. App—Texarkana 2011, no pet.)). However, a defendant who does not desire to wear jail attire must timely object. *Id.*

The State argues that not only did Appellant fail to object to wearing jail clothes, but he was also not compelled to do so and actually refused the opportunity to wear street clothes during trial. However, Appellant contends that he did not make a knowing and voluntary waiver of his constitutional right to be tried free of "jail garb."

We disagree with Appellant. First, Appellant was evaluated for competency by Michele L. Borynski, the chief psychologist of the competency program at the

North Texas State Hospital – Vernon Campus. In her report, Borynski stated that Appellant was, in her opinion, competent to stand trial. She noted:

> Although [Appellant] is often resistant to efforts to assess his understanding of pending proceedings and his legal situation, it is my clinical opinion that this represents a deliberate effort on the part of [Appellant] to delay and/or avoid prosecution, and that such symptoms are not the product of a current mental disease or defect.

Borynski further noted that Appellant had the ability to work with his defense attorney, although he may have been unwilling to do so, and that he "may continue to exaggerate and/or feign symptoms in an attempt to appear Incompetent to Stand Trial." Second, while Appellant ranted about "these people" that were mistreating him, he was able to relate to his attorney that he would like the jury to assess punishment in his case. Further, defense counsel explained that he had visited with Appellant and that Appellant did not wish to wear the clothing that was brought for him. But Appellant failed to present to the trial court an objection to wearing jail clothing; therefore, he has not preserved error for our review. Accordingly, Appellant's argument is without merit. Appellant's first point of error is overruled.

Appellant contends in his second point of error that his constitutional rights were violated because he was shackled during trial. The use of physical restraints visible to the jury is prohibited unless the trial court, in its discretion, finds that the restraints are justified by an essential State's interest such as physical security, escape prevention, or courtroom decorum. *Deck v. Missouri*, 544 U.S. 622, 628 (2005). Courts have held that some circumstances justify the use of restraints during trial, including situations where an accused expressed his intention to escape, made threats of physical violence, resisted being brought to court, repeatedly interrupted the court proceedings, attempted to leave the courtroom, or engaged in other egregious conduct. *Cedillos v. State*, 250 S.W.3d 145, 148–49 (Tex. App.—Eastland 2008, no pet.). However, to preserve error on appeal, Appellant must object to the

use of restraints in the jury's presence. *Id.* at 149–50. Appellant did not make such an objection to the trial court and, therefore, has not preserved this issue. Appellant's second point of error is overruled.

In Appellant's third point of error, he argues that the trial court erred when it instructed the jury on a mandatory presumption without a limiting instruction required by Section 2.05 of the Texas Penal Code. A person commits the offense of assault on a public servant if he intentionally, knowingly, or recklessly causes bodily injury to a person the actor knows is a public servant while the public servant is lawfully discharging an official duty. TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(1) (West Supp. 2016). In its instructions given to the jury, the trial court stated, "The actor is presumed to have known the person assaulted was a public servant or security officer if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant or status as a security officer." *See id.* § 22.01(d). However, if the jury instruction includes the Section 22.01(d) instruction, Section 2.05(a)(2) of the Penal Code requires:

> (2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:
>
> > (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
> >
> > (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;
> >
> > (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

> (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Id. § 2.05(a)(2).

The State concedes that the trial court erred in failing to charge the jury as required by Section 2.05(a). Without the required instructions from Section 2.05(a), the presumption in Section 22.01 is an unconstitutional, mandatory presumption. *See Willis v. State*, 790 S.W.2d 307, 309–10 (Tex. Crim. App. 1990); *Webber v. State*, 29 S.W.3d 226, 230 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Mandatory presumptions are unconstitutional because they relieve the State of the burden of proving every element of the offense beyond a reasonable doubt. *Garrett v. State*, 220 S.W.3d 926, 930 (Tex. Crim. App. 2007). Because Appellant did not object at trial to this error in the court's charge, we cannot reverse the conviction absent a finding that the error caused Appellant to suffer egregious harm. *Bellamy v. State*, 742 S.W.2d 677, 685 (Tex. Crim. App. 1987); *Almanza v. State*, 686 S.W.2d 157, 171–72 (Tex. Crim. App. 1985). In determining whether Appellant suffered egregious harm, we consider (1) the complete jury charge; (2) the arguments of counsel; (3) the entirety of the evidence, including the contested issues and weight of the probative evidence; and (4) any other relevant factors revealed by the record as a whole. *Hollander v. State*, 414 S.W.3d 746, 749–50(Tex. Crim. App. 2013); *Almanza*, 686 S.W.2d at 171.

Carper, a jailer at the Eastland County Jail, testified that on June 14, 2014, at the request of Appellant, he was delivering cleaning supplies to Appellant in his "seg cell." A "seg cell" is used for disciplinary purposes and for the protection of the inmates and staff. Carper explained, "As I opened the door with my left hand and was using my right to slide the bucket in, [Appellant] stepped out and struck me

numerous times in the head and neck area." Carper testified that he was wearing his jailer uniform at the time of the incident. The shirt that Carper was wearing when the incident occurred was admitted into evidence. Further, Carper asserted that, based on his uniform and his prior dealings with Appellant, Appellant would have known that he was a public servant.

Appellant argues that, because the State "pushed" the presumption to the jury, it relied on the presumption heavily and, thus, was unconstitutionally relieved of proving an essential element beyond a reasonable doubt. Appellant directs us to the State's closing argument:

> The first thing I want to cover is public servant, and the definition of public servant is similar to what I read to you during jury selection. It says the actor is presumed to have known the person assaulted was a public servant or a security officer, if the person was wearing a distinctive uniform or badge, indicating the person's employment as a public servant, or status as a security officer.
>
> Here's the shirt the jailer was wearing, Mr. Carper, and there's his badge. So the State has a presumption, and it's in your jury instructions that the actor, which is that man, [Appellant], knew that Aaron Carper, our jailer, was a public servant, and that's the law.
>
> . . . .
>
> We submit to you that he knew because of his prior experiences with Aaron Carper and because of this uniform, and the presumption that the State gets because of the uniform. That Aaron Carper was lawfully doing his duty, and you heard from Aaron Carper. He was working as a jailer at Eastland County Jail discharging his duties. Then you will find the defendant guilty of assault against public servant as charged within our indictment. I submit to you that all the evidence is there to support that.

In *Hollander*, the Court of Criminal Appeals explained that, although the prosecutor told the jury on several occasions that the State had to supply

"corroborating" evidence to prove the presumption and reminded the jury that the State had the overall burden of proof, those assertions "did nothing to ameliorate the lack of an instruction regarding the specific level of *confidence* necessary for the jury to rely on those predicate facts before implementing the presumption." *Hollander*, 414 S.W.3d at 750–51. The Court held: "In an egregious-harm analysis, the question is not simply whether, when viewed in the light most favorable to the verdict, the jury *could* rationally have found predicate facts to a level of confidence beyond a reasonable doubt." *Id.* at 751. "Instead, a reviewing court must evaluate the likelihood, considering the record as a whole, that a properly instructed jury *would* have found the predicate facts to the requisite level of confidence." *Id.*

Taking into consideration *Hollander*, we hold that the error did not egregiously harm Appellant. The uniform shirt that Carper was wearing at the time he was assaulted by Appellant was admitted into evidence, Carper testified that he was wearing his jailer uniform at the time of the assault, and Carper was delivering cleaning supplies to Appellant as requested by Appellant himself. Carper had had prior dealings with Appellant as well, and Appellant was familiar with Carper's status as a jailer. Further, Appellant presented no contradictory evidence, nor did he otherwise dispute the fact that Carper was a public servant. *See McIlvennia v. State*, No. 03-14-00352-CR, 2016 WL 3361185, at *10 (Tex. App.—Austin June 10, 2016, pet. ref'd) (mem. op., not designated for publication). Appellant's third point of error is overruled.

In Appellant's fourth point of error, he challenges the sufficiency of the evidence to prove that Appellant used a deadly weapon during the commission of the aggravated assault. Appellant argues that the State cannot prove what weapon was used and, therefore, cannot satisfy the definition of a deadly weapon. In support of this argument, Appellant asserts that the weapon used was unknown; that the weapon found was not similar to what was described by the witness; and that,

because an immediate search was not performed, Appellant had time to dispose of any weapon he may have used in the assault.

We review the sufficiency of the evidence, whether denominated as a legal or as a factual sufficiency claim, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we examine all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

Flores, an inmate at the Eastland County Jail, was working as a breakfast trusty on July 1, 2014. As a breakfast trusty, Flores served breakfast to other inmates. On that particular morning, Flores attempted to serve breakfast to Appellant in Appellant's cell. Flores approached the "bean chute" to serve Appellant as normal, and "all of a sudden, pow," something hit his hand. A bean chute is a door that measures approximately twelve inches long by five inches deep that inmates receive their food through. Flores sustained a gash on his finger that left a scar. Flores testified that Appellant had to swing through the bean chute and that Appellant did it in a slashing and stabbing manner with a lot of force. Flores explained that Appellant came at him in the stomach area but that his "finger deflected it, whatever he was trying to aim at." Flores did not know what he was hit with, but he thought he saw a "spoon with a sharpened end."

Shreve, a jailer at the Eastland County Jail, supervised the trusties while they served breakfast in the segregation cell area. Shreve stated that he could see something protruding from Appellant's hand when Appellant struck at Flores, but Shreve could not tell what it was. Shreve explained that they did not search

Appellant's cell immediately after the incident because they did not have enough staff on hand at the time. Roger Lynn Brownlee, the Eastland County Jail administrator, testified that, when he arrived at the jail on July 1, they removed Appellant from his cell and did a "shakedown" of his cell, but nothing was found. Brownlee brought Appellant back to his cell and ordered him to remove his clothing to see if he had any weapons on him at the time. Appellant pulled out a weapon from his pants and held it up toward Brownlee in a threatening manner. The weapon was a screw modified with a handle made out of cloth from the mattress cover and wrapped in plastic cellophane. The weapon was admitted into evidence. Brownlee testified that the weapon was capable of causing serious bodily injury or death. Brownlee stated, "[Appellant] said out of respect for me he let me live from taking the weapon."

A person commits aggravated assault if he commits an assault and "uses or exhibits a deadly weapon during the commission of the assault." PENAL § 22.02(a)(2) (West 2011). A deadly weapon is "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or . . . anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 1.07(a)(17); *see McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000). "Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." PENAL § 1.07(a)(46). "The placement of the word 'capable' is crucial to understanding this method of determining deadly-weapon status." *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008) (citing *McCain*, 22 S.W.3d at 503). "The State is not required to show that the 'use or intended use causes death or serious bodily injury' but that the 'use or intended use is *capable* of causing death or serious bodily injury.'" *Id.* A jury may consider several factors

when considering whether an object is a deadly weapon, including (1) the words of the accused, (2) the intended use of the weapon, (3) the size and shape of the weapon, (4) testimony by the victim that he feared death or serious bodily injury, (5) the severity of any wounds inflicted, (6) the manner in which the assailant allegedly used the object, (7) physical proximity of the parties, and (8) testimony as to the weapon's potential for causing death or serious bodily injury. *Romero v. State*, 331 S.W.3d 82, 83 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

The record shows that the evidence was sufficient to prove that the weapon used by Appellant was a deadly weapon. Appellant used a screw with a handle and forcefully came at Flores through the bean chute in a slashing and stabbing manner. Appellant was stabbing at Flores in the stomach area, but he hit Flores's finger instead, causing a laceration that left a scar. Further, Brownlee testified that the object Appellant used was capable of causing serious bodily injury or death. Accordingly, we hold that a rational jury could have found beyond a reasonable doubt that the modified screw was a deadly weapon. Appellant's fourth point of error is overruled.

Appellant's fifth and sixth points of error concern the admissibility of evidence and the sufficiency of the evidence in the punishment phase of trial. In Appellant's fifth point of error, he argues that the trial court erred when it admitted hearsay and unauthenticated evidence to prove the enhancement paragraph. In Appellant's sixth point of error, he contends that the evidence was insufficient to prove the enhancement paragraph. Specifically in his sixth point, Appellant argues that, because of a lack of a stipulation, fingerprints, distinguishing marks, or a witness to the underlying conviction, the evidence did not link Appellant to the judgment of a previous conviction.

We will first address Appellant's sixth point of error. To establish that a defendant has been convicted of a prior offense, the State must prove beyond a

reasonable doubt that a prior conviction exists and that the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). There is no specific manner in which the State must prove these two elements. *Id.* The totality of the circumstances determines whether the State met its burden of proof. *Id.* at 923. Some of the ways by which a defendant may be linked to a prior conviction are through the testimony of a fingerprint expert, through the testimony of a witness who personally knows that the defendant was previously convicted and can identify the defendant, by the defendant's stipulation or judicial admission, or by a photograph that is contained in the prior judgment or pen packet. *See, e.g.*, *Beck v. State*, 719 S.W.2d 205, 209 (Tex. Crim. App. 1986); *Littles v. State*, 726 S.W.2d 26, 31–32 (Tex. Crim. App. 1984). "[W]hen conducting a legal sufficiency review, this Court considers all evidence in the record of the trial, whether it was admissible or inadmissible." *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

Kenneth Preston, an investigator for the Eastland County District Attorney, testified for the State. Investigator Preston testified that the "Personal Information Sheet" that the trial court admitted into evidence contained Appellant's date of birth, driver's license number, address, and a picture of Appellant. Investigator Preston explained that the information sheet came from the Eastland County Jail.

A certified "Minute Order" from the Superior Court of California, County of Fresno, for a prior conviction for possession of a weapon in a jail was also admitted into evidence. Investigator Preston explained that the minute order was the same thing as a judgment and a sentence in Texas. The minute order had the same date of birth and driver's license number for Appellant as the personal information sheet. However, there was a discrepancy between Appellant's physical characteristics listed on the personal information sheet and the minute order. The personal information sheet reflected that Appellant's height was six feet two inches and his

weight was 250 pounds, whereas the minute order reflected that Appellant's height was five feet seven inches and his weight was 160 pounds. Also acquired by Investigator Preston was a booking photo of Appellant that Investigator Preston received in an e-mail from Fresno County. The booking photo contained Appellant's name and date of birth.

Investigator Preston also ran Appellant's driver's license number through the Texas Crime Information Center (TCIC) and the National Crime Information Center (NCIC), and the report associated with that driver's license number came back to Appellant. The report showed the same date of birth for Appellant as found on the minute order and the personal information sheet, and an address that matched the address found on the personal information sheet.

Appellant argues that the evidence tended to exclude Appellant because (1) Appellant did not stipulate that he was the defendant in the California conviction; (2) no one testified that he saw Appellant commit the crime; (3) there was no documentation that included conclusive identifiers, such as a photograph or fingerprints; and (4) the height and weight identifiers on the minute order were inaccurate. We disagree. The personal information sheet included personal descriptors, such as a date of birth, address, and driver's license number for Appellant, and included a picture to compare to the defendant on trial. *See Flowers*, 220 S.W.3d at 925. The minute order included an identical date of birth and driver's license number as that on the information sheet, and a booking photo from Fresno County was also available to review. After a review of the record, a rational juror could have found beyond a reasonable doubt that Appellant was previously convicted of a felony in California. Therefore, we hold that the evidence was sufficient to support a finding of true as to the alleged prior conviction of possession of a weapon in jail. Appellant's sixth point of error is overruled.

In Appellant's fifth point of error, he argues that the trial court erred when, over Appellant's hearsay and authentication objections, it admitted the personal information sheet, a booking photo associated with the minute order from Fresno County, and the "27 check" on Appellant's driver's license. A trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). If the ruling is within the zone of reasonable disagreement, an appellate court will not disturb it. *Id.* There is no abuse of discretion if the trial court "reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified." *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007).

Whether to admit evidence at trial is a preliminary question to be decided by the trial court. TEX. R. EVID. 104(a); *Tienda*, 358 S.W.3d at 637. Only relevant evidence is admissible. TEX. R. EVID. 402. Relevant evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence[,] and . . . the fact is of consequence in determining the action." TEX. R. EVID. 401. Evidence not properly authenticated is irrelevant, and authentication is a "condition precedent" to admissibility. *Tienda*, 358 S.W.3d at 638; *see* TEX. R. EVID. 901(a).

Rule 901(a) of the Texas Rules of Evidence provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." One of the ways in which a proponent can satisfy the requirement is by offering testimony from a witness who has knowledge of what the item is and who testifies that the item is what it is claimed to be. TEX. R. EVID. 901(b)(1). If the proponent produces evidence sufficient to support a finding of authenticity, the trial court should admit the proffered evidence. *Tienda*, 358 S.W.3d at 638. Whether an item actually is what its proponent claims it to be is a question for the factfinder.

Id. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion and will not interfere with that ruling unless it is outside the "zone of reasonable disagreement." *Id.* (quoting *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)).

Investigator Preston testified as to the authenticity of all of the challenged exhibits. The exhibits were not certified, nor did they bear a seal or a "signature purporting to be an execution or attestation." *See* TEX. R. EVID. 902(1), (4). As to the personal information sheet, Investigator Preston testified that it was on letterhead from the Eastland County Jail and that it included personal identifiers of Appellant, including a photograph of Appellant. However, Investigator Preston did not prepare the document. The author of the information sheet was unknown.

Also admitted into evidence was a booking photo associated with the minute order from Fresno County. Investigator Preston said that he received the booking photo from an e-mail transmission from Fresno County, California. Investigator Preston also stated that the photo purported to be Appellant and that, in his opinion, it was Appellant. Investigator Preston also acknowledged the large variance between the height and weight of Appellant stated on the minute order associated with the booking photo and the accurate height and weight of Appellant. Additionally, there was no evidence regarding the sender of the e-mail or the e-mail address that the photo was sent from.

Appellant also challenges the authenticity of the "27 check" that Investigator Preston ran on Appellant's driver's license number. Investigator Preston explained that he is the administrator over Eastland County Dispatch and that he has access to TCIC and NCIC. TCIC and NCIC are "the housers of all crime information reported by law enforcement." Investigator Preston ran Appellant's driver's license number through the TCIC/NCIC computer system and got a return of information on Appellant, such as height and weight. However, on voir dire

examination, Investigator Preston testified that he actually requested that it be run through his "center." There is no evidence of who prepared the report. Defense counsel objected to the admission of the exhibit because Investigator Preston was not the proper party to authenticate it.

We agree with Appellant that the challenged evidence was not properly authenticated. Investigator Preston's testimony was the only evidence presented that went toward the authenticity of the exhibits. However, Investigator Preston did not author any of the documents admitted; he only requested such information from outside sources. Therefore, his testimony alone was not enough to authenticate the evidence. Further, the documents were not certified, nor sealed and signed. Accordingly, it was an abuse of discretion to admit such evidence.

Because error has occurred, we must now determine if such error harmed Appellant. The erroneous admission of evidence is nonconstitutional error. *See Hernandez v. State*, 176 S.W.3d 821, 824–25 (Tex. Crim. App. 2005). Rule 44.2(b) of the Texas Rules of Appellate Procedure applies to nonconstitutional errors. Pursuant to Rule 44.2(b), an error is not reversible error unless it affects a substantial right of the defendant. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error has "a substantial and injurious effect or influence in determining the jury's verdict." *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

We conclude that Appellant was substantially harmed by the erroneous admission of evidence. Without the admission of such evidence, the minute order would have been the only evidence remaining to establish that Appellant was previously convicted in Fresno County, California. The minute order standing alone is insufficient to prove the enhancement. *See Littles v. State*, 726 S.W.2d at 28 (Certified copies of a judgment and sentence standing alone are not sufficient to prove the allegations even where the name on the judgment and sentence is the same

as the defendant on trial.). We hold that, without the erroneously admitted evidence, a reasonable juror could not have found the enhancement allegation to be true. Accordingly, Appellant's fifth point of error is sustained.

We affirm the judgment of the trial court as to the conviction of Appellant in each cause, but we reverse each judgment insofar as it relates to punishment. We remand these causes to the trial court for a new punishment hearing. *See* TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (West Supp. 2016).

PER CURIAM

August 17, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Countiss.[1]

Bailey, J., not participating.

[1]Richard N. Countiss, Retired Justice, Court of Appeals, 7th District of Texas at Amarillo, sitting by assignment.