Affirmed as Reformed and Memorandum Opinion filed August 26, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00131-CR

FRANKIE L. POLK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1175958

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

A jury convicted appellant, Frankie L. Polk, of sexual assault of a child. Appellant pleaded "not true" to an enhancement paragraph alleging he was previously convicted of robbery and "true" to an enhancement paragraph alleging he was previously convicted of forgery. The jury found both enhancement allegations were "true" and assessed punishment at ninety-nine years' confinement.[1] In two issues, appellant contends (1) the

[1] *See* Tex. Penal Code Ann. § 12.42(d) (Vernon Supp. 2009) (prescribing, subject to certain exceptions inapplicable in this case, range of punishment for felony offense when defendant has two previous felony convictions as confinement for not less than twenty-five years nor more than ninety-nine years or life).

trial court erred by denying appellant's request, made after this appeal ensued, to supplement the reporter's record with documents purportedly demonstrating the robbery conviction was not final for enhancement purposes, and (2) the evidence is legally and factually insufficient to support the jury's finding of "true" to the enhancement paragraph concerning the robbery conviction because it was not final. Although we reject appellant's contentions, the judgment inaccurately recites that the jury found the enhancement paragraph concerning the robbery conviction was "not true." Accordingly, we reform the judgment and affirm as reformed.

REQUEST TO SUPPLEMENT THE RECORD

At the punishment phase of trial, the State offered, and the trial court admitted, without objection, a penitentiary packet which reflected on its face that the robbery conviction was final. After this appeal ensued, appellant filed in our court an "agreed motion" to abate the appeal. Appellant attached records from the court in which he was convicted of robbery reflecting he was initially placed on probation for five years, probation was subsequently revoked, probation was later reinstated, and the term of probation was subsequently extended to seven years. Appellant contends these documents show the robbery conviction was not final as required for enhancement purposes. *See Ex parte White*, 211 S.W.3d 316, 319 (Tex. Crim. App. 2007) (recognizing that, for enhancement purposes, prior conviction must be final conviction and generally probated sentence is not final conviction unless probation is revoked); *Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992) (stating that, even if defendant had "regular" probation revoked, if he then receives "shock" probation, conviction becomes non-final for enhancement purposes unless "shock" probation is revoked).

However, these documents were not offered during trial of the present case or via motion for new trial. Therefore, appellant requested our court to abate the appeal so that he could present to the trial court a motion to supplement the record with these documents. A divided panel of this court abated the appeal. Appellant then filed his motion to supplement the record. The trial court conducted a hearing and admitted the documents only for purposes of the hearing. By written order, the trial court denied the

motion. Our court then reinstated this appeal, and the parties filed their appellate briefs. In his first issue, appellant argues the trial court erred by denying his request to supplement the record.[2]

In his written motion to supplement, appellant did not present any specific ground to support the requested relief. However, at the hearing, appellant claimed he was entitled to supplementation "on the basis of optional completeness" because the State presented evidence during trial that was allegedly false and misleading with respect to finality of the robbery conviction.

On appeal, appellant contends this case presents a "novel" and "unique" situation requiring supplementation of the record because of the State's alleged presentation of misleading and incomplete information. Appellant then cites Rule of Appellate Procedure 44.4, entitled "Remediable Error of the Trial Court," which provides,

> (a) *Generally.* A court of appeals must not affirm or reverse a judgment or dismiss an appeal if:
>
> > (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and
> >
> > (2) the trial court can correct its action or failure to act.
>
> (b) *Court of Appeals Direction if Error Remediable.* If the circumstances described in (a) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had not occurred.

Tex. R. App. P. 44.4.

[2] In the abatement order, our court cited Rule of Appellate Procedure 34.6(e) and ordered the trial court to determine whether there was an inaccuracy in the record and, if so, to correct the inaccuracy. *See* Tex. R. App. P. 34.6(e)(2) (authorizing trial court to resolve dispute on accuracy of reporter's record and, if it finds inaccuracy, order reporter's record conformed to what occurred in the trial court); Tex. R. App. P. 34.6(e)(3) (allowing appellate court, if dispute arises regarding accuracy after filing of reporter's record in appellate court, to submit dispute to trial court for resolution). However, in his motion to supplement and at the hearing, appellant did not claim there was an inaccuracy in the existing record. Rather, he requested *supplementation* of the record with the documents at issue. Therefore, although the request considered by the trial court was different than the purpose for which we abated, the trial court did deny appellant's requested relief, and it is this denial of which he now complains.

In contrast to Rule of Appellate Procedure 34.6(d), which permits supplementation of the reporter's record to include matters that were part of the trial record but omitted from the appellate record, Rule 44.4 is designed to effect the creation of a new record. *LaPointe v. State*, 225 S.W.3d 513, 522 (Tex. Crim. App. 2007); *see* Tex. R. App. P. 34.6(d).[3] "When a trial court has erroneously withheld information necessary to evaluate a defendant's claim on appeal (e.g. failure to file required findings of fact) or has prevented the defendant from submitting information necessary to evaluate his claim (e.g. refusing to permit an offer of proof), the appellate court is directed to step in and order the trial court to correct the situation." *Id.* The key to Rule 44.4 is that there must be an error the appellate court can correct. *Id.*

Appellant suggests that Rule 44.4 is applicable because the trial court's purported error in refusing to supplement the record with the documents at issue prevents appellant from challenging on appeal the jury's finding of "true" to the enhancement paragraph. However, the trial court did not commit any error as contemplated under Rule 44.4 by refusing to supplement the record. *See* Tex. R. App. P. 44.4; *LaPointe*, 225 S.W.3d at 522. Rather, the documents at issue are not part of the record because appellant failed to offer them during trial pursuant to the rule of optional completeness or on any other ground. Moreover, the rule of optional completeness is not "novel" or "unique" but instead is contained in the Texas Rules of Evidence. *See* Tex. R. Evid. 107 ("When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence . . . ."). Therefore, in essence, the trial court refused to admit evidence after judgment was rendered that appellant did not offer during trial. Accordingly, appellant's Rule 44.4 argument lacks merit. We overrule appellant's first issue.

[3] At the hearing, the State argued that Rule 34.6(d) is inapplicable because the documents at issue were not part of the trial record. Appellant acknowledges on appeal that Rule 34.6(d) does not apply and relies instead on Rule 44.4.

SUFFICIENCY OF THE EVIDENCE

In his second issue, appellant contends the evidence is legally and factually insufficient to support the jury's finding of "true" to the enhancement paragraph concerning the robbery conviction. The complaint presented in the argument portion of appellant's brief is dependent on his contention regarding supplementation of the record; he argues the documents at issue demonstrate the robbery conviction was not final for enhancement purposes. Because the trial court did not err by refusing to supplement the record, we also reject this challenge to legal and factual sufficiency of the evidence.

At oral argument in this appeal, appellant suggested that his trial testimony alone reflected the robbery conviction was not final for enhancement purposes. During the guilt-innocence phase, the State elicited appellant's testimony that he received five years' probation for the robbery conviction and then "did 60 days shock probation." The State elicited this testimony apparently for impeachment purposes, but appellant now relies on it to support his factual-sufficiency challenge. Appellant's oral argument regarding the effect of this testimony was confined to a factual-sufficiency challenge. Although appellant did not specifically advance this argument in his appellate brief, we will consider it because his stated issue presents a general sufficiency challenge.

In examining a factual-sufficiency challenge, we review all evidence in a neutral light and set aside a verdict only if (1) the evidence is so weak that the verdict seems either clearly wrong or manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006). Although we may substitute our judgment for the jury's when considering credibility and weight determinations, we may do so only to a very limited degree and must still afford due deference to the jury's determinations. *See Marshall*, 210 S.W.3d at 625. In this case, the jury was free to disbelieve appellant's testimony regarding his receipt of probation for the robbery conviction, and we find no reason to intrude on its decision. Therefore, appellant's testimony does not render the evidence factually insufficient to

support the jury's finding of "true" to the enhancement paragraph. Accordingly, we overrule appellant's second issue.

REFORMATION OF THE JUDGMENT

Finally, as the State notes in its appellate brief, the judgment inaccurately recites that the jury found the enhancement paragraph concerning the robbery conviction was "NOT TRUE," although sentence was imposed in accordance with the jury's findings. An appellate court has the power to correct and reform a trial court judgment "to make the record speak the truth when it has the necessary data and information to do so," irrespective of whether any party objected in the trial court. *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Asberry v. State*, 813 S.W.2d 526, 529–31 (Tex. App.—Dallas 1991, pet. ref'd). When a judgment improperly reflects the findings of the jury, the proper remedy is reformation of the judgment. *Asberry*, 813 S.W.2d at 529 (citing *Aguirre v. State*, 732 S.W.2d 320, 327 (Tex. Crim. App. 1982)).

Accordingly, we reform the judgment to change the "Findings on 1st Enhancement Paragraph" from "NOT TRUE" to "TRUE," and we affirm the judgment as reformed.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Anderson, Frost, and Seymore.
Do Not Publish — Tex. R. App. P. 47.2(b).