In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00205-CR

ROBERT WAYNE GOODROE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Hunt County, Texas
Trial Court No. CR1600114

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Robert Wayne Goodroe's vehicle was stopped in Greenville after being observed driving on the wrong side of a two-way street and failing to timely signal before turning onto a cross street. This stop resulted in a charge against Goodroe for driving while intoxicated (DWI), with the additional recitation of a previous DWI conviction, possibly resulting in a Class A misdemeanor. *See* TEX. PENAL CODE ANN. § 49.09(a) (West Supp. 2016). Goodroe was convicted by a Hunt County jury of DWI, sentenced to 365 days' confinement, and fined $4,000.00, the maximum penalties for a conviction of the charged Class A misdemeanor.

In this appeal, Goodroe challenges the legal sufficiency of the evidence supporting the jury's finding that he was previously convicted of DWI and contends that he was denied effective assistance of counsel for a failure to object to the admission, during the punishment phase of trial, of evidence of a prior DWI in Louisiana.

We reform the judgment of the trial court to reflect a conviction of Class B misdemeanor DWI and remand this case to the trial court to conduct a new punishment hearing to properly assess punishment for that conviction, subject to possible sentence enhancement. We reach that result, because (1) Goodroe's conviction for a Class A DWI[1] cannot stand and (2) a new punishment hearing is required.

[1]The record reveals an inconsistency in how the alleged prior DWI conviction in Louisiana was treated in the trial court—whether as an offense enhancement or as a sentence enhancement. Because the information and the judgment, which we interpret as controlling the issue, treat the prior DWI as an offense enhancement, we address this case as an offense enhancement. On the other hand, the Louisiana DWI was considered a sentence enhancement in the State's notice of intent to enhance Goodroe's punishment with the prior, 2004 DWI, and no evidence of the 2004 DWI was introduced until the punishment phase of trial. Even if the prior DWI was used as just a sentence enhancement, the judgment must be modified to reflect Goodroe's conviction only for the Class B DWI, and Goodroe must be given a new punishment trial. Without an offense enhancement, Goodroe could have been convicted only of a Class B

Before addressing these issues, we provide some procedural context. Goodroe was charged by information with DWI. The information stated:

> IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS
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> I, Joel D. Littlefield, County Attorney of Hunt County, Texas, present[] in and to the Hunt County Court At Law No. I, that on or about [the] **1st** day of **November, 2015,** and before the filing of this information, in Hunt County, Texas, **ROBERT WAYNE GOODROE,** hereinafter called Defendant, did then and there operate a motor vehicle in a public place while the said defendant was intoxicated.
>
> And it is further presented in and to said Court that, prior to the commission of the aforesaid offense, on the 8th day of December, 2004, in cause number C 125592 in the 26th Judicial Court of Bossier Parrish, Louisiana the defendant, **ROBERT WAYNE GOODROE,** was convicted of an offense relating to the operating of a motor vehicle while intoxicated.

The face of the information also bore the note "DRIVING WHILE INTOXICATED 2ND OFFENSE" and, directly beneath that, "CLASS A." Before trial, the State filed its first amended notice of intent to enhance punishment pursuant to Section 12.43 of the Texas Penal Code,[2] listing, *inter alia*, the 2004 DWI conviction. At the beginning of the guilt/innocence phase of the trial, the State read only the first paragraph of the information, relating to the 2015 DWI, to which Goodroe pled not guilty. During the guilt/innocence phase of the trial, the State put on evidence of only the 2015 DWI, and Goodroe did not stipulate or admit to the 2004 DWI conviction. In the court's

misdemeanor. *See* TEX. PENAL CODE ANN. § 49.04(b) (West Supp. 2016). Here, Goodroe was sentenced to one year's confinement and a $4,000.00 fine—the maximum punishment for a Class A Misdemeanor. Goodroe's sentence was also in excess of that authorized for a sentence-enhanced Class B Misdemeanor, which could support punishment of only between 30 days and 180 days of confinement and/or up to a $2,000.00 fine. *See* TEX. PENAL CODE ANN. § 12.43(b) (West 2011).

[2]*See* TEX. PENAL CODE ANN. § 12.43 (West 2011) (providing for enhanced punishment for repeat and habitual misdemeanor offenders).

charge, the jury was not advised of the 2004 DWI conviction and was asked to determine only whether the State had proven beyond a reasonable doubt that Goodroe was guilty of the 2015 DWI, which it answered in the affirmative.[3]

In the punishment phase of the trial, the State offered the evidence of the 2004 DWI conviction and of two other misdemeanor convictions. At the close of evidence, the jury found the State's allegations regarding the 2004 DWI conviction true and assessed Goodroe a punishment of 365 days' confinement in the county jail and a $4,000.00 fine.

In this case, the court's judgment recites that the jury found Goodroe guilty of "DRIVING WHILE INTOXICATED 2ND" and adjudges him guilty of the same offense. Chapter 49 of the Texas Penal Code sets forth the various offenses related to intoxication and alcoholic beverage offenses. Section 49.04 provides that a person commits the offense of DWI "if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a) (West Supp. 2016). "Except as provided under Subsections (c) and (d) [of Section 49.04] and [except as provided under] Section 49.09," an offense under Section 49.04 "is a Class B misdemeanor, with a minimum sentence of 72 hours." TEX. PENAL CODE ANN. § 49.04(b) (West Supp. 2016). To obtain a conviction under this section, the State must show beyond a reasonable doubt that the person (1) was intoxicated (2) while operating a motor vehicle (3) in a public place. TEX. PENAL CODE ANN. § 49.04(a); *see Oliva v. State*, No. 14-15-01078-CR, 2017 WL 1155125, at *5 (Tex. App.—Houston [14th Dist.] Mar. 28, 2017, pet. granted).

[3]Goodroe does not challenge the sufficiency of the evidence supporting this jury finding.

A second-offense DWI, however, is governed by Section 49.09(a). "[A]n offense under 49.04 . . . is a Class A misdemeanor, with a minimum confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated . . . ." TEX. PENAL CODE ANN. § 49.09(a). To obtain a conviction for a second-offense DWI, the State must show, beyond a reasonable doubt, all of the elements in Section 49.04(a), plus one prior DWI conviction. *Oliva*, 2017 WL 1155125, at *5; *Mapes v. State*, 187 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).[4]

[4]Some Texas courts have held that a prior DWI conviction under Section 49.09(a) is treated as an enhancement of the punishment, rather than a separate element of the offense. *See Prihoda v. State*, 352 S.W.3d 796, 806 (Tex. App.—San Antonio 2011, pet. ref'd); *Wood v. State*, 260 S.W.3d 146, 147, 149 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Blank v. State*, 172 S.W.3d 673, 676 (Tex. App.—San Antonio 2005, no pet.); *Love v. State*, 833 S.W.2d 264, 265–66 (Tex. App.—Austin 1992, pet. ref'd). However, as the Fourteenth Court of Appeals has noted, each of these cases is based on either *Love*, or *Wilson v. State*, 772 S.W.2d 118, 123 (Tex. Crim. App. 1989). *Oliva*, 2017 WL 1155125, at *4. Both *Love* and *Wilson* construed Section 49.09's predecessor statute, Article *6701l*-1. *See Wilson*, 772 S.W.2d at 123; *Love*, 833 S.W.2d at 265–66. Unlike Section 49.09(a), Article 6701*l*-1 did not elevate a second DWI to a Class A misdemeanor. Rather, Article 6701*l*-1 provided:

> (d) If it is shown on the trial of an offense under this article that the person has previously been convicted one time of an offense under this article, *the offense is punishable by*:
> (1) a fine of not less than $300 or more than $2,000; and (2) confinement in jail for a term of not less than 15 days or more than two years.

Act of May 27, 1983, 68th Leg., R.S., ch. 303, § 3, art. 6701*l*-1, 1983 Tex. Gen. Laws 1568, 1574–77, *repealed by* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.15, 1993 Tex. Gen. Laws 3586, 3704 (emphasis added). In 1993, the Legislature codified intoxication offenses in Chapter 49 of the Penal Code, and created the current differing degrees of DWI offenses. *Oliva*, 2017 WL 1155125, at *4; *see* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, secs. 49.04, 49.09, 1993 Tex. Gen. Laws 3586, 3586, 3697–98 (current versions at TEX. PENAL CODE §§ 49.04, 49.09) (amended 1995, 2001, 2003, 2005, 2007, 2011, 2015). Under Section 49.09(a), a second DWI offense became a Class A misdemeanor. *Oliva*, 2017 WL 1155125, at *4; *see* TEX. PENAL CODE ANN. § 49.09(a).

The Texas Court of Criminal Appeals has noted, "The legislature clearly knows the difference between enhancing the level of an offense and enhancing the level of punishment." *Ex parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012). The court went on to compare the language used by the Legislature in Sections 49.07 and 49.09(b-4) of the Penal Code with that used in Section 12.42 of the Penal Code. *Id.* Section 49.07 states that "an offense under this section is a felony of the third degree," and 49.09(b-4) states that "[a]n offense under Section 49.07 is a felony of the second degree if [its conditions are met]." *Id.* (citing TEX. PENAL CODE ANN. § 49.07(c) (West 2011), § 49.09(b-4) (West Supp. 2016). In contrast, Section 12.42(a), (b) uses the language "shall be punished for a felony of the second or first degree." *Id.* (citing TEX. PENAL CODE ANN. § 12.42 (passim) (West Supp. 2016). Likewise, when the Legislature abandoned the "is punishable by" language used in Article 6701*l*-1, and replaced it

(1) Goodroe's Conviction for a Class A DWI Cannot Stand

Goodroe argues on appeal that legally insufficient evidence supports his conviction under Section 49.09(a) (second DWI). There are two reasons why Goodroe's conviction for a Class A DWI cannot stand: he was actually tried for simple Class B DWI, and the guilt/innocence evidence is legally insufficient to support a conviction for a Class A DWI.

Before we address the evidence and when it was admitted, we first determine that the incorrect judgment must be modified so that it speaks the truth. *See Bigley v. State*, 865 S.W.2d

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with "an offense under 49.04 . . . . is a Class A misdemeanor" used in Section 49.09(a), we can infer that the Legislature intended to change a prior DWI offense from an enhancement of punishment to an element of the new Class A misdemeanor offense.

Further, the Texas Court of Criminal Appeals has recognized that, under Chapter 49 of the Penal Code, there are three grades of DWI. In *Gibson v. State*, the court noted:

> There are three grades of the offense of driving while intoxicated. The difference between the grades is set by the number of prior convictions for certain intoxication-related offenses. The offense of driving while intoxicated, without any alleged prior intoxication-related convictions, is a Class B misdemeanor. TEX. PENAL CODE § 49.04(b) & (c). If the State can prove a defendant had previously been convicted of one offense related to operating a motor vehicle, aircraft or watercraft while intoxicated, the driving while intoxicated offense becomes a Class A misdemeanor. TEX. PENAL CODE § 49.09(a). . . . If the State can prove a defendant had "previously been convicted two times of an offense" related to operating a motor vehicle, aircraft or watercraft while intoxicated, the driving while intoxicated offense becomes a felony of the third degree. TEX. PENAL CODE § 49.09(b).

Gibson v. State, 995 S.W.2d 693, 695–96 (Tex. Crim. App. 1999). In *Gibson*, the court held that "the plain language of Section 49.09(b) . . . indicates it should not be viewed as a punishment-enhancement statute." *Id.* at 696. Rather, the court concluded that the "prior intoxication-related offenses serve the purpose of enhancing the offense in Section 49.09(b). *Id.* At the time, Section 49.09(b) provided, "If it is shown on the trial of an offense under Section 49.04 . . . that the person has previously been convicted two times of an offense relating to the operating of a motor vehicle while intoxicated, . . . the offense is a felony of the third degree." Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, secs. 49.04, 49.09, 1993 Tex. Gen. Laws 3586, 3586, 3697–98. This language is substantially the same as Section 49.09(a)'s "an offense under 49.04 . . . is a Class A misdemeanor . . . if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operation of a motor vehicle while intoxicated. . . ." TEX. PENAL CODE ANN. § 49.09(a). Looking at the plain language of Section 49.09(a), then, a prior DWI conviction serves the purpose of enhancing a DWI to a Class A misdemeanor. *See Gibson*, 995 S.W.2d at 696.

For further discussion, we would recommend the opinion from our sister court in *Oliva* on this point. *See Oliva*, 2017 WL 1155125, at *2–5.

26, 27–28 (Tex. Crim. App. 1993); *Juarez v. State*, 461 S.W.3d 283, 300–01 (Tex. App.—Texarkana 2015, no pet.).

The judgment against Goodroe recites that the jury found Goodroe guilty of the offense of "DRIVING WHILE INTOXICATED 2ND" and proceeds to adjudge Goodroe guilty of that offense and to assess against Goodroe the maximum jail time and maximum fine for such a Class A DWI. The judgment, however, runs counter to most of the rest of the record.

The information that charged Goodroe in this case was presented in two paragraphs, the first setting out the basic DWI, which, if taken alone, alleged only a Class B DWI. The second paragraph describes the 2004 Louisiana DWI, but it is ambiguous as to whether it sets it out as an offense enhancement to a Class A DWI or simply a punishment enhancement. The page on which the information is set out also has a reference to a Class A DWI, but that detail is unnecessary to the information and therefore surplusage, not part of the information proper. *See Whetstone v. State*, 786 S.W.2d 361, 364 (Tex. Crim. App. 1990); *Mayfield v. State*, 117 S.W.3d 475, 477 (Tex. App.—Texarkana 2003, pet. ref'd).

The State's First Amended Notice of Intention to Use Extraneous Offenses and Prior Convictions, which notified Goodroe that the State might use the offenses at any time during either phase of trial, included the 2004 Louisiana DWI offense. The State's First Amended Notice of Intent to Enhance Punishment also included the 2004 Louisiana DWI offense.

In charging the jury during the guilt/innocence phase of Goodroe's trial, the trial court read only paragraph one of the information, the paragraph setting out a simple Class B DWI. At that stage, it made no reference to the 2004 Louisiana DWI and referred to the State's reading of the

information at the beginning of trial. In fact, when the State had read the information at the beginning of trial, it had read only the first paragraph, after Goodroe pointedly had asked the trial court to make sure that the State's reading excluded paragraph two of the information, the paragraph setting out the 2004 DWI.

The court's charge to the jury during guilt/innocence charged only simple DWI, that is, the Class B DWI, making no reference to the 2004 DWI. It also referred to the evidence the jury had at that point, which excluded the 2004 DWI.

The jury's verdict at guilt/innocence found Goodroe guilty of DWI "as charged in the Information." As read to the jury, that is, its first paragraph only, the information charged only simple DWI, without reference to the 2004 Louisiana DWI.

The above items strongly suggest that the parties and the trial court were all treating the 2004 DWI as a punishment enhancement only and that Goodroe was convicted of a simple, Class B DWI, without reference to the 2004 DWI during guilt/innocence. Because Goodroe was tried to a guilty verdict on simple, Class B DWI, the judgment must be modified to reflect that truth. *See Juarez*, 461 S.W.3d at 300–01; *Figueroa v. State*, 250 S.W.3d 490, 518 (Tex. App.—Austin 2008, pet. ref'd).

Even if the parties had tried this as a Class A DWI, we also agree that there is legally insufficient guilt/innocence evidence of a prior DWI that would support a finding that Goodroe was guilty of a Class A DWI. While Goodroe argues on the one hand that evidence admitted during the *punishment* phase did not establish any prior conviction for DWI sufficient to support

the jury's verdict at punishment, he also argues that the evidence does not support a conviction for DWI, second offense. We agree.

Evidence admitted during the punishment phase of trial cannot supply proof of an element of the charged offense. *Barfield v. State*, 63 S.W.3d 446, 450 (Tex. Crim. App. 2001); *Munoz v. State*, 853 S.W.2d 558, 560 (Tex. Crim. App. 1993). Even admission of guilt during the punishment phase of trial does not supply missing evidence of guilt. *Leday v. State*, 983 S.W.2d 713 (Tex. Crim. App. 1998). Therefore, evidence proving the elements of the offense must be presented during the guilt/innocence phase of trial. Because evidence of the prior DWI was admitted only during the punishment phase of trial, this record contains legally insufficient evidence of a prior DWI as an element of the offense of a Class-A-misdemeanor DWI. *See* TEX. PENAL CODE ANN. § 49.09(a). The Class-A-misdemeanor-DWI conviction cannot stand.

Because of the failure to provide evidence of an element of the offense of Class-A-misdemeanor DWI, we address whether the jury, in convicting Goodroe of the greater-inclusive offense of Class A DWI—assuming it did so in this case—must have necessarily found every element of another, lesser-included offense. *See Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014); *Gaddy v. State*, 433 S.W.3d 128, 130–31 (Tex. App.—Fort Worth 2014, pet. ref'd). Since the elements of a Class A DWI under Section 49.09(a) are the elements of a Class B DWI under Section 49.04(b), plus a prior DWI conviction, in finding Goodroe guilty of the Class A DWI, the jury necessarily found the elements of a Class B DWI. *Compare* TEX. PENAL CODE ANN. § 49.04(b) *with* § 49.09(a).

Because the jury necessarily found all the elements of a Class B DWI, the next question is whether there is legally sufficient evidence to support those findings. *See Thornton*, 425 S.W.3d at 300; *Gaddy*, 433 S.W.3d at 130–31. Chapter 49 of the Texas Penal Code sets forth the various offenses related to intoxication and alcoholic beverage offenses. Section 49.04 provides that a person commits the offense of DWI "if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a). "Except as provided under Subsection[s] (c) and (d) and Section 49.09," an offense under Section 49.04 "is a Class B misdemeanor, with a minimum sentence of 72 hours." TEX. PENAL CODE ANN. § 49.04(b). To obtain a conviction under this Section, the State must show beyond a reasonable doubt that the person (1) was intoxicated (2) while operating a motor vehicle (3) in a public place. *Oliva*, 2017 WL 1155125, at *5.

On the night of Goodroe's 2015 arrest for DWI, Greenville Police Officer Warren Williamson observed Goodroe driving a motor vehicle on the left-hand side of Benton Street, a two-way street in Greenville. After the vehicle failed to timely signal before turning onto a cross street, Williamson initiated a traffic stop. Goodroe exhibited signs of possible intoxication, so Williamson administered standardized field sobriety tests on Goodroe. Goodroe told Williamson that he had taken prescription medication. When Goodroe produced the bottle, the label contained a warning against taking the medication and operating heavy machinery. Based on this information and Goodroe's poor performance on the horizontal-gaze-nystagmus and the walk-and-turn tests, Goodroe was arrested and charged with DWI. Goodroe consented to a blood draw, which was determined to contain the presence of methamphetamine, amphetamine, and

alprazolam. A Texas Department of Public Safety (TDPS) drug analyst likened the effects of alprazolam to alcohol and stated that it was possible for a person to be intoxicated with the amount of alprazolam found in Goodroe's blood. A TDPS forensic scientist testified that there was a high level of methamphetamine in Goodroe's blood and opined that there was a high likelihood that a person with that level of methamphetamine would have lost the normal use of their mental and physical faculties. The evidence is sufficient to support a conviction of Goodroe for Class B DWI.

The judgment must be modified to reflect a conviction for Class B DWI. *See Thornton*, 425 S.W.3d at 300; *Gaddy*, 433 S.W.3d at 130–31.

(2) A New Punishment Hearing Is Required

"A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). Any court with jurisdiction may notice and correct an illegal sentence. *Id.* A punishment and sentence that falls outside the applicable statutory range is void. *Mizell v. State*, 70 S.W.3d 156, 163 (Tex. App.—San Antonio 2001), *aff'd*, 119 S.W.3d 804.

In this case, the appropriate conviction is of DWI under Section 49.04(a) of the Texas Penal Code, a Class B misdemeanor. Even if Goodroe's punishment were enhanced pursuant to Texas Penal Code Section 12.43 through the introduction of prior convictions, including the 2004 DWI conviction, that would result only in a fine of up to $2,000.00, confinement in jail for not less than 30 days or more than 180 days, or both. *See* TEX. PENAL CODE ANN. § 12.43(b). Nevertheless, following the court's charge in the punishment phase, the jury assessed punishment at 365 days' confinement, and a fine of $4,000.00, and the trial court sentenced Goodroe, and assessed a fine,

in accordance with the jury's punishment verdict. Since the sentence and fine exceed the maximum sentence and fine allowed under Section 12.43(b), it is illegal and void. *See Mizell*, 119 S.W.3d at 806.

Because legally insufficient evidence supports the Class A conviction, but the evidence does support a Class B conviction, Goodroe's punishment must be reassessed on remand. *See Thornton*, 425 S.W.3d at 307.

Because a new punishment phase must be conducted, the alleged insufficiency of Goodroe's trial counsel in not objecting to the admission of State's Exhibit 6 during the earlier punishment phase is moot and will not be addressed here.

We reform[5] the trial court's judgment convicting Goodroe of, and sentencing him for, Class A misdemeanor DWI so that it, instead, reflects a judgment convicting him of the lesser-included offense of Class B misdemeanor DWI under Section 49.04(b) of the Texas Penal Code—that is, without a prior offense-enhancing DWI. Further, we remand this matter to the trial court to conduct a new punishment hearing to properly assess punishment for Goodroe's Class B misdemeanor DWI, subject to possible sentence enhancement by the 2004 DWI under Section 12.43(b) of the Texas Penal Code.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 31, 2017
Date Decided: September 1, 2017

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[5]Since we find that the jury, in convicting Goodroe of the greater-inclusive offense, necessarily found all the elements of the lesser-included offense and that the evidence is legally sufficient to support those findings on all the elements of the lesser-included offense, we are "authorized—indeed required—to avoid the 'unjust' result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense." *Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014).