



**IN THE
TENTH COURT OF APPEALS**

No. 10-14-00127-CR

MILTON RAY CRAWFORD,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 272nd District Court
Brazos County, Texas
Trial Court No. 13-04461-CRF-272**

MEMORANDUM OPINION

In 1984, Appellant Milton Ray Crawford pled guilty to the offense of sexual assault and was sentenced to fifteen years in prison. Thereafter, he had two felony convictions for failing to register as a sex offender, the second one being in Brazos County in 2009. Crawford registered in 2009, 2010, and 2011. In 2013, Crawford was indicted for the third-degree felony offense of failing to comply with sex-offender registration. *See* TEX. CODE CRIM. PROC. ANN. art. 62.102(b)(2) (West Supp. 2014). The indictment alleged the two prior convictions for failing to register as enhancements.

Crawford testified that he thought that sex-offender registration was unfair to him because it had not been required in 1984, and that in 2011, he received legal advice from a legal-aid line that he did not have to register. He also believed that sex-offender registration was not applicable because his conviction was not for the offense of indecency with a child. In August of 2011, Crawford told Carla Field, who is responsible for sex-offender registration in Brazos County, that he would no longer register, and she told him that he was required to register for the rest of his life. Crawford admitted that he did not register in March of 2012, which led to the instant charge. A jury found Crawford guilty. He pled true to the two prior convictions, and the jury, after finding the prior convictions true, assessed an 85-year prison sentence. Asserting five issues, Crawford appeals.

In his first issue, Crawford contends that the 85-year sentence is illegal because the punishment range was improperly enhanced under Penal Code section 12.42(d), which provides a punishment range of 25 to 99 years or life for habitual offenders:

(d) Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection.

TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2014). In his second issue, Crawford asserts that he was harmed by the improper enhancement because the jury was

improperly charged on the punishment range; instead, he asserts that enhancement should have been to a second-degree felony.

Crawford asserts that enhancement could only be done under article 62.102(c), which provides:

If it is shown at the trial of a person for an offense or an attempt to commit an offense under this article that the person has previously been convicted of an offense or an attempt to commit an offense under this article, the punishment for the offense or the attempt to commit the offense is increased to the punishment for the next highest degree of felony.

TEX. CODE CRIM. PROC. ANN. art. 62.102(c).

Crawford acknowledges that two of our sister courts have addressed this issue adversely to his position but contends that they were wrongly decided or dicta. *See Reyes v. State*, 96 S.W.3d 603, 605 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (“As such, article 62.10(c) [now 62.102(c)] provides a very specific exception to the general enhancement statute, but does not otherwise preclude the application of section 12.42.”).

Appellant also argues that section 12.42(b) cannot be used to enhance his punishment because article 62.102 includes a unique punishment-enhancement section. Article 62.102(c) provides that an offender’s punishment level is increased to the next highest felony if he is found guilty of a failure-to-register offense and has previously been convicted of a failure-to-register offense. TEX. CODE CRIM. PROC. ANN. art. 62.102(c). The Court of Criminal Appeals recently agreed that article 62.102(c) is a punishment-enhancement provision and does not enhance the offense level of the charged offense. *See Ford*, 334 S.W.3d at 231-35. However, article 62.102(c) is not implicated in appellant’s case because his punishment was not enhanced by a prior failure-to-register conviction, but by his prior aggravated-assault conviction. Moreover, we reject appellant’s contention that inclusion of subsection (c) to article 62.102 precludes the application of section 12.42(b) to enhance a defendant’s punishment for a failure-to-register conviction. *We agree that a prior failure-to-register conviction could have been used to enhance appellant’s punishment to a first-degree felony under either article 62.102(c) or section 12.42(b).* Thus, there is some overlap

between these statutes. However, *punishment enhancement under article 62.102(c) is not merely repetitive of that provided by section 12.42*. For example, *although article 62.102(c) provides for punishment enhancement to the next highest felony degree when the defendant has one prior failure-to-register conviction, under certain subsections of section 12.42, punishment for a failure-to-register conviction may be enhanced only if the defendant has two prior felony convictions*. Compare TEX. CODE CRIM. PROC. ANN. art. 62.102(c), with TEX. PENAL CODE ANN. § 12.42(a)(1), (2). Furthermore, *nothing in article 62.102(c) suggests that it is the exclusive provision governing punishment enhancement for a failure-to-register conviction*. Accordingly, we reject appellants argument that article 62.102(c) precluded the State’s use of section 12.42(b) to enhance his punishment. See *Reyes v. State*, 96 S.W.3d 603, 605 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d) (rejecting similar argument concerning former version of article 62.102(c) and expressing “article 62.10(c) [predecessor of article 62.102] provides a very specific exception to the general enhancement statute, but does not otherwise preclude the application of section 12.42”). We conclude that appellant’s offense level for punishment was properly enhanced from a second-degree felony to a first-degree felony pursuant to section 12.42(b). See TEX. PENAL CODE ANN. § 12.42(b).

Barker v. State, 335 S.W.3d 731, 738 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d) (emphases added).

We are not persuaded that *Barker* and *Reyes* misstate the law. We hold that Crawford’s sentence is not illegal and that he was not harmed. Issues one and two are overruled.

In issue three, Crawford asserts that the trial court abused its discretion by allowing Crawford’s 1984 sexual-assault conviction “to serve quadruple duty in his conviction and punishment assessed.”¹ Largely relying on *Ballard v. State*, 149 S.W.3d 693 (Tex. App.—Austin 2004, pet. ref’d), Crawford contends that “having used Crawford’s

¹ Crawford alleges that the “quadruple duty” consisted of the 1984 sexual-assault conviction first serving as the reportable conviction that gave rise to his duty to register. Second, it served as the sexually violent offense that determined the term and frequency of his duty to register and thus made his failure to comply a third-degree felony. The third and fourth duties were its serving as the basis on which prosecution was brought for the two prior failure-to-register convictions.

1984 sexual assault conviction to prove that he had a duty to register as a sex offender (to prove, in other words, that Crawford had the status of being required to register), the State could not also use that conviction or a conviction derived therefrom to enhance his punishment.”

But as the State points out, in *Ballard*, the court held that the prohibited use of the underlying sexual-assault conviction was as one of the two prior felony convictions to punish the appellant as a habitual offender under Penal Code section 12.42(d). *Id.* at 696. Crawford’s underlying sexual-assault conviction was not used to enhance his punishment, as had been done in *Ballard*. We thus overrule issue three.

Issues four and five contend that the trial court abused its discretion by failing to grant a mistrial when the State twice allegedly made improper arguments in the punishment phase. Proper jury argument includes: (1) summation of the evidence presented at trial; (2) reasonable deduction drawn from that evidence; (3) answer to the opposing counsel’s argument; or (4) a plea for law enforcement. *York v. State*, 258 S.W.3d 712, 717 (Tex. App.—Waco 2008, pet. ref’d) (citing *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000)).

The denial of a motion for mistrial, appropriate for “highly prejudicial and incurable errors,” is reviewed for abuse of discretion. *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). We consider three factors when determining whether the trial court abused its discretion in overruling a motion for mistrial during punishment: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of the punishment assessed absent the misconduct (likelihood of the same punishment being assessed). *Perez v. State*, 187 S.W.3d 110, 112 n.1 (Tex. App.—Waco 2006, no pet.) (quoting *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)).

Id. at 716.

In issue four, Crawford alleges that the State improperly argued that the jury should apply parole law to any sentence assessed against Crawford. In the punishment phase, the prosecutor argued:

So, I'm going to tell you right now, we're asking for the high end of this sentence; and I'm going to take this time because the question will come up during your deliberations, I anticipate, what's the difference between 99 years and life? The difference is that with the 99-year sentence, it is mathematically possible that he could get off of parole. With life, it's not.

Crawford objected, and the trial court sustained the objection and instructed the jury to disregard the statement. Crawford then moved for a mistrial, which the trial court denied.

Citing an unpublished opinion, the State contends that the argument was not improper.² The State alternatively argues that the instruction to disregard cured any error. We assume without deciding that the argument was improper, but we find that, because the trial court's prompt instruction to disregard cured any error, denying the motion for mistrial was not an abuse of discretion. *See* at 716-17. Issue four is overruled.

In issue five, Crawford asserts that the trial court abused its discretion by failing to grant a mistrial when the State allegedly made an improper argument about Crawford being a danger to every child he is around. In the punishment phase, the prosecutor argued:

You know what kind of man he is. You know where he belongs. Because on the streets of our community, he is nothing but a danger to

² *Sepulveda v. State*, No. 13-07-00627-CR, 2009 WL 1677530 (Tex. App.—Corpus Christi Feb. 12, 2009, pet. ref'd) (mem. op., not designated for publication).

every single person he comes into contact with, to every single female that walks the streets, to every child that he's around, he is a danger. Not only because - -

The trial court sustained Crawford's objection that the argument about children was outside the evidence and promptly instructed the jury to disregard it. The trial court then denied Crawford's motion for mistrial.

In the punishment phase, Crawford's niece Kim testified that she had not had an objection to Crawford's possibly living with her in the past and that she would not have any concern about Crawford being around her one-year-old daughter because he had "never tried anything with us or any other family members." The State thus asserts that the argument at issue was a proper response to this testimony. We agree, and we further find that if any error occurred, it was cured by the trial court's prompt instruction to the jury to disregard it. Issue five is overruled.

Having overruled all of Crawford's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins

Affirmed
Opinion delivered and filed September 24, 2015
Do not publish
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