IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD–135–13

DAVID SAMARIPAS, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS BRAZOS COUNTY

MEYERS, J., delivered the opinion of the Court in which JOHNSON, KEASLER, HERVEY, COCHRAN, and ALCALA, JJ., joined. KELLER, P.J., filed a dissenting opinion in which PRICE, J., joined. WOMACK, J., concurred.

O P I N I O N

A jury convicted Appellant, David Samaripas, Jr., of engaging in organized criminal activity[1] and sentenced him, as a habitual criminal, to 53 years in the Texas Department of Criminal Justice–Correctional Institutions Division, an enhanced

[1] *See* TEX. PEN. CODE § 71.02. The jury found that Appellant committed the underlying offense of deadly conduct with the intent to establish, maintain, or participate as a member of a criminal street gang.

punishment based on two alleged prior convictions. Appellant appealed, arguing that the trial court improperly sustained the State's objection to Appellant's questions during voir dire. The court of appeals concluded that Appellant failed to preserve error. *Samaripas v. State*, No. 13-11-00442-CR, 2013 Tex. App. LEXIS 430, at *16-19 (Tex. App.—Corpus Christi Jan. 17, 2013, pet. granted).

We granted review to address the following two questions raised by Appellant: (1) In order to preserve error relative to a limitation on voir dire examination of a prospective juror, must a defendant object after the trial court sustains the State's objection to a proposed question? (2) May a non-aggravated state-jail felony conviction, previously punished under the range for a second-degree felony, be used for the purpose of enhancing punishment to that of a habitual criminal under Texas Penal Code Section 12.42(d)?[2]

We hold that error was preserved and that the court of appeals failed to apply the correct, particularized standard regarding preservation of error during voir dire. We further hold that, under Sections 12.42(d) and (e) of the Texas Penal Code as it was worded at the time of Appellant's offense in the present case, the non-aggravated state-jail felony conviction that was punished as a second-degree felony was properly used for subsequent habitual-criminal punishment enhancement. We will reverse and remand to the court of appeals for consideration of the merits of the first issue.

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[2]Unless otherwise noted, all references to Sections refer to the Texas Penal Code.

FACTS AND PROCEDURAL HISTORY

Appellant was a member of the Latin Kings gang. Due to recent gang activity, officers were patrolling a known gang area when they heard gunshots. When they reached the house where the shots had been fired, the resident described the car from which the shots had come and told the officers which direction the car had gone. The officers saw a car matching the description and attempted to stop the car. The driver did not stop, and a high-speed chase ensued. During the pursuit, officers saw something being thrown out of the front passenger window. The car eventually came to a stop when the driver ran over "stop sticks" that had been placed on the highway by the police. Appellant was the front-seat passenger of the car. Officers retrieved the item that had been thrown out of the car and found that it was a colostomy bag containing a nine-millimeter handgun, three magazines, a cell phone, and two quarters. Lab tests indicated that the cartridge cases found at the scene of the shooting had been ejected from the handgun found in the colostomy bag. Officers determined that the house where the drive-by shooting occurred belonged to members of the Latin Kings's rival gang, the Surenos, and that Appellant had to use a colostomy bag due to a gunshot injury he had suffered during a gang fight between the Latin Kings and the Surenos the previous month.

The jury found Appellant guilty of engaging in organized criminal activity and determined that he had used or exhibited a deadly weapon during its commission. In the sentencing phase, the State submitted two prior convictions for enhancement purposes.

Appellant pled true to the prior conviction of assault of a public servant, but objected to the second offense, which was a state-jail felony for evading arrest, punished as a second-degree felony due to two prior enhancements. Finding both enhancement paragraphs true, the jury sentenced Appellant as a habitual criminal to 53 years' imprisonment.

Appellant appealed the decision, claiming that the evidence was insufficient, that the trial court abused its discretion in limiting his voir dire examination, that the trial court erred in instructing the jury on the law of parties, and that his sentence was improperly enhanced. The court of appeals affirmed Appellant's conviction and sentence. Appellant filed a petition for discretionary review, asking us to consider whether the court of appeals erred in holding that he failed to preserve the voir dire error and whether his prior state-jail felony conviction could be used for sentence enhancement.

PRESERVATION OF ERROR DURING VOIR DIRE

Issue Background

On appeal, Appellant argued that the trial court abused its discretion by improperly limiting his voir dire examination of a prospective juror. At issue was the question: "What type of evidence would you expect to hear? What type of evidence do you expect the State of Texas to bring you, Ms. O'Neal, in an effort to prove to you beyond a reasonable doubt that someone committed an offense?" The State objected to it as an improper commitment question, and after a brief discussion at the bench, the trial court

sustained the objection.

Just before Appellant's counsel posed the question at issue on appeal, the following exchange occurred:

> DEFENSE: [Directed at Ms. Davis] In that class three years ago, you probably learned there's no definition provided by the court to "beyond a reasonable doubt"; is that right?
>
> MS. DAVIS: Right. We had a long discussion about it.
>
> DEFENSE: And did that make sense to you?
>
> MS. DAVIS: It can be fuzzy.
>
> DEFENSE: It can be fuzzy. In order to convince somebody beyond a reasonable doubt—I'll come back to you, Ms. O'Neal. What type of evidence would you expect the State of Texas to bring to you in order to convince you that somebody committed an offense beyond a reasonable doubt?

The State objected to this question, and the trial court called the parties to the bench.

> COURT: I think he is entitled to say what is your understanding of reasonable doubt, as long as he doesn't give them a definition they have to adhere to.
>
> STATE: But if he's saying what [evidence] do you need for you to get to guilty?

The trial court sustained the objection, and Appellant's counsel rephrased with the question that was at issue on direct appeal:

> DEFENSE: What type of evidence would you expect to hear? What type of evidence do you expect the State of Texas to bring you, Ms. O'Neal, in an effort to prove

to you beyond a reasonable doubt that someone committed an offense?

Again, the State objected and the parties were called to the bench.

STATE: Same question: "What do you expect?"

COURT: You're going to bind them to a certain level of evidence.

DEFENSE: Just asking them what do they expect the State of Texas to bring them evidence wise.

COURT: I don't have a problem with that question. Ask it that way. Sustained.

STATE: But to prove somebody guilty at that point in time, that's why.

COURT: I can't let them get committed to a certain proof in order to find somebody.

DEFENSE: I'm understanding that.

COURT: I sustain the objection.

[End of bench conference.]

DEFENSE: In a criminal case, Ms. O'Neal, what type of evidence would you expect to hear period?

MS. O'NEAL: Factual.

DEFENSE: Factual evidence. What type of factual evidence, Ms. Gallagher?

MS. GALLAGHER: Good. Well, maybe some eyewitnesses.

DEFENSE: Eyewitnesses. Okay, what else? Now, we're talking about engaging in organized criminal activity deadly

conduct charge. What are you expecting?

MR. GRAUKE: Physical evidence.

DEFENSE: Physical evidence. Number 23, what type of evidence would you expect?

MR. GRAUKE: Gun.

DEFENSE: A gun. Okay.

MR. GRAUKE: If that was the case.

DEFENSE: What else? What other type of evidence could we have, factual physical evidence? A gun. What else might you expect?

VENIREPERSON: Eyewitness.

VENIREPERSON: Expert testimony.

DEFENSE: Expert testimony. On what?

STATE: Judge, I'm sorry. We're going back to the same thing. Essentially saying here's what we need to prove to get to beyond a reasonable doubt.

DEFENSE: That's not my question, Judge.

COURT: Come up here again.

[At the bench, on the record.]

STATE: I keep objecting because he's trying the same exact. He's saying what kind of evidence, factual evidence—

COURT: Make clear to them in your question that your question is predicated that there're many different kinds of evidence some of it which you can hear, some of which you cannot hear. In other words, what you're doing

now, again, is binding them to hear certain evidence before they can say guilty.

DEFENSE: I respectfully disagree, your Honor. I'm just asking them their expectations for trial.

COURT: Well, phrase it clearly that these may or may not be necessary to find reasonable doubt, please.

DEFENSE: Yes, sir.

COURT: Then you can ask it.

[End of bench conference.]

DEFENSE: Understanding that these items of evidence that we're talking about here may or may not create reasonable doubt, may or may not convince you beyond a reasonable doubt—okay, we talked about physical evidence; we talked about guns; we talked about—we were at expert testimony. Who said that?

In addressing preservation of error *sua sponte*, the court of appeals assumed, without deciding, that Appellant's question was proper and that its prohibition constituted an abuse of discretion. *Samaripas*, No. 13-11-00442-CR at *18. The court of appeals then applied general error-preservation standards, stating that Appellant failed to object to the trial court's ruling, complied with the ruling, rephrased his questions, and neither discussed nor challenged the ruling's effect on the scope of voir dire. *Id*. at *18-19. Accordingly, the court of appeals held that Appellant failed to preserve the issue for review. *Id*. at *19.

Arguments of the Parties

Appellant argues that the preservation-of-error ruling by the court of appeals does not comport with prevailing precedent established by this Court. He identifies *Nunfio v. State*, 808 S.W.2d 482, 484 (Tex. Crim. App. 1991), and *Campbell v. State*, 685 S.W.2d 23, 25 (Tex. Crim. App. 1985), as enunciating unique error-preservation standards in the context of voir dire.

Appellant contends that, because the court of appeals assumed an abuse of discretion by the trial court, if this Court holds that error was preserved, then the only remaining issue to be decided on remand is whether disallowing the question was harmful.

The State says that the court of appeals properly "reviewed the context of the discussions to determine whether the issues about commitment and expectations of the evidence implicated any concern about limiting the scope of Appellant's voir dire."

The State argues that unique error-preservation standards do not apply in the present case. In support of this assertion, it distinguishes our holding in *Campbell* as controlling only circumstances in which the trial court has made a solitary ruling to disallow a question. The State also asserts that the trial court's explanation of its rationale for sustaining the commitment objection is significant. It argues that, after the trial court explained its ruling, Appellant had to identify some concern that being required to rephrase his question would pose an unconstitutional limitation on the scope of his voir dire. Instead, according to the State, Appellant complied with the order and rephrased the

question.

Finally, the State contends that Appellant's claim on appeal did not comport with the issue at trial—"none of Appellant's complaints here informed the trial court that its ruling risked limiting the scope of voir dire or prevented the exercise of intelligent strikes."

Analysis

A trial court has broad discretion over the voir dire process, including setting reasonable limits and determining the propriety of a particular question. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). We stated that "A trial court's discretion is abused only when a proper question about a proper area of inquiry is prohibited. A question is proper if it seeks to discover a juror's views on an issue applicable to the case." *Id*. (citations omitted).

Appellate courts apply unique standards with respect to preservation of error during voir dire. If a party asks a proper question of the venire, the other party objects, and the court sustains the objection, then error is preserved. *Campbell*, 685 S.W.2d at 25. "Appellant asked the question, and the State objected to the question. The trial court sustained the objection. Appellant was thus prevented, by a ruling of the court, from asking a proper voir dire question of the jury panel. The error was preserved for review." *Id*. Appellant was not required to further develop or exhaust the subject at issue by engaging in further questioning. *Id*. at 26. *See also Nunfio v. State*, 808 S.W.2d at 484,

overruled on other grounds in Barajas, 93 S.W.3d at 40*, and Gonzales v. State*, 994 S.W.2d 170, 172 (Tex. Crim. App. 1999). The State mischaracterizes our holding in *Campbell* as determining that error is preserved in such circumstances only when the court has made a solitary ruling to disallow a proffered question. We stated in *Campbell* that further questioning or development of the subject at issue is not required to preserve error. 685 S.W.2d at 26. However, it does not follow that engaging in further questioning or development causes error to be forfeited.

The State also argues that Appellant did not alert the trial court that the ruling improperly limited the scope of voir dire or impacted his ability to intelligently exercise his peremptory strikes. He was not required to. As we stated in *Nunfio*, "Once appellant posed the specific question he sought to ask the venire and the judge refused to allow the question, the ruling by the trial court amounted to a direct order not to ask the question. Appellant obtained a specific ruling as to a specific question and properly preserved the issue for review." 808 S.W.2d at 484.

The court of appeals erroneously applied general standards of preservation of error in evaluating Appellant's issue. *Samaripas*, No. 13-11-00442-CR at *19 (citing Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a)(1); *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004)). Under the proper standard, however, the court of appeals's own recounting of the circumstances would have been sufficient to show that the error was preserved: "During voir dire, defense counsel asked a veniremember [a question.] . . . The

State objected to the question as an improper commitment question, and the trial court sustained the objection." *Samaripas*, No. 13-11-00442-CR at *16-17.

We remand to the court of appeals to determine whether the trial court abused its discretion by prohibiting defense counsel from asking a proper question about a proper area of inquiry and if so, whether appellant was harmed by the trial court's error.

SENTENCE ENHANCEMENT

Issue Background

Appellant's primary conviction, engaging in organized criminal activity, was based on the underlying offense of deadly conduct, a third-degree felony offense. TEX. PEN. CODE § 71.02(a)(1); TEX. PEN. CODE § 22.05(e). Engaging in organized criminal activity elevated the offense to a second-degree felony. TEX. PEN. CODE § 71.02(b). For further punishment enhancement as a habitual offender under Penal Code Section 12.42(d), the State alleged two prior felony convictions, the second of which was for evading arrest with a motor vehicle, a state-jail felony under Penal Code Section 38.04(b)(1). Appellant's punishment for evading arrest with a motor vehicle had itself been enhanced to that of a second-degree felony under Section 12.42(a).[3]

At the time of Appellant's offense in the present case, relevant provisions of the habitual offender statute, Section 12.42, read as follows:

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[3]As provided by former Texas Penal Code 12.42(a)(2), two previous felony convictions were shown for punishment enhancement of Appellant's conviction for evading arrest with a motor vehicle. Effective September 1, 2011, Section 12.42(a) was amended by Act of May 25, 2011, 82nd Leg., R.S., ch. 834 § 2, 2011 Tex. Gen. Laws 834.

> (d) . . . [I]f 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 he 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.
>
> (e) A previous conviction for a state jail felony *punished* under Section 12.35(a) may not be used for enhancement purposes under Subsection (b), (c), or (d).[4] (Emphasis added).

Appellant argued on appeal that, contrary to the proscription in Section 12.42(e), his sentence had been unlawfully enhanced under Section 12.42(d) with a state-jail felony conviction—evading arrest with a motor vehicle. He maintained that, although the punishment for that offense had been enhanced, that did not enhance the level of the underlying offense and, therefore, it should be excluded from use for punishment enhancement of his current offense.

The court of appeals agreed with the State's position that Section 12.42(e) is unambiguous in its plain-text reading: Only prior state-jail felony convictions actually

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[4] Effective September 1, 2011, Sections 12.42(d) and (e) were amended by Act of May 25, 2011, 82nd Leg., R.S., ch. 834 §§ 4, 6, 2011 Tex. Gen. Laws 834. The Legislature repealed Section 12.42(e), incorporating its language into Section 12.42(d), except using the word "punishable" rather than "punished." Section 12.42(d) now reads, "A previous conviction for a state jail felony *punishable* under Section 12.35(a) may not be used for enhancement purposes under this subsection." (Emphasis added). The bill analysis characterized the change as "nonsubstantive." and stated that, "[L]egislation is needed to clarify the meaning [of the repeat and habitual felony offender] provisions and to specify that the felonies do not include state jail offenses that are not aggravated. H.B. 3384 seeks to remain true to the intent of the legislature when it created the lower-level category of state felony offenses and to retain the special treatment given to state jail offenses punishable as aggravated state jail felonies."

punished under Section 12.35(a) are prohibited from being used for enhancement. Appellant's prior conviction was punished under Section 12.42(a)(2). According to the statute's plain meaning, the court concluded, Section 12.42(e) is inapplicable in this case. *See Samaripas*, No. 13-11-00442-CR at *30-31. The court stated that such a construction of the statute did not create an absurd result, given the legitimate legislative goal of "[p]unishing a defendant more severely after repeated behavior that has escalated beyond the level of an unenhanced state jail felony offense." *Id*. at *31.

Arguments of the Parties

Appellant argues now, as he did on appeal, that our decision in *Ford v. State*, 334 S.W.3d 230 (Tex. Crim. App. 2011), bars the use of his prior state-jail felony conviction for enhancement purposes.

The State argues that the plain meaning of the statute authorizes the use of both prior convictions for habitual-criminal enhancement.

Analysis

In *Ford*, we considered whether the sex-offender-registration statute allowed prior offenses to increase the level of punishment or the level of the offense. We stated that because the registration statute referred to "punishment," it operates, as does Section 12.42, by increasing only the level of punishment that applied to the primary offense. We held that, while the punishment level may be increased to the range of the next highest felony, the level of the offense was not increased. *Id*. at 235. We agree with the holding

in *Ford* in that Appellant's prior state-jail felony was not increased to a higher offense. However, at the time of Appellant's current offense, Section 12.42(e) prohibited only state-jail felonies that had not been previously enhanced from being used for habitual-offender status. Prior to September 1, 2011, Section 12.42(e) stated that, "A previous conviction for a state jail felony punished under Section 12.35(a) may not be used for enhancement purposes under Subsection (b), (c), or (d)."[5] We agree with the court of appeals that the plain language of the statute makes it clear that, at the time of Appellant's offense, Section 12.42(e) focused on how the previous state-jail felony was actually punished and precluded from use for enhancement only those state-jail felonies that had not been punished under the range of a higher felony. Here, Appellant was not punished under Section 12.35(a). His prior state-jail felony had been enhanced, and he was punished for that offense under Section 12.42(a)(2). Therefore, the prior offense was properly used for enhancement purposes, and the court of appeals did not err in overruling this issue.

CONCLUSION

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[5]Effective September 1, 2011, Section 12.42(e) was repealed and the following language was added to subsection (d): "A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection." Under this language, a state-jail felony, even if it has been enhanced, cannot be used to enhance a subsequent felony offense. The distinction between the former "punished under Section 12.35(a)" language and the current "punishable under Section 12.35(a)" is significant here because Appellant was not punished under Section 12.35(a) but his prior offense was *punishable* under that section. Had he committed the current offense after this amendment, it would not have been proper for his prior state-jail felony to be used for enhancement.

The judgment of the court of appeals is affirmed on the second issue. We reverse the judgment of the court of appeals on the first issue and remand the case for consideration of the first issue on the merits.

Delivered: October 15, 2014

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