COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-14-00088-CR
Appellant,	§	Appeal from
v.	§	243rd District Court
CHRISTOPHER SCOTT ADAMS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20130D03661)

O P I N I O N

In *State v. Meadows*[1] we held that in a pretrial hearing the State was not required to marshal its evidence to prove the facts supporting an enhancement paragraph. We also held that even if the State eventually failed to prove an enhancement paragraph which qualifies a misdemeanor offense as a felony, the district court is not deprived of jurisdiction over the underlying misdemeanor charge. The district court's order in this case overlooked both of these holdings. Accordingly, we reverse.

FACTUAL SUMMARY

Christopher Scott Adams was charged with assault against a household or family member which was enhanced because, according the indictment, "Defendant was previously convicted of

[1] 170 S.W.3d 617, 620 (Tex.App.--El Paso 2005, no pet.).

an offense against a member of Defendant's family or household under section 22.01 of the Texas Penal Code, to wit: on the 14th day of May, 2003, in cause number 03-1-00533-0 in the Superior Court of the State of Washington in and for the County of Spokane." The assault (intentionally, knowingly, or recklessly causing bodily injury) would constitute a class A misdemeanor. TEX.PENAL CODE ANN. § 22.01(b)(West Supp. 2015). The enhancement paragraph, however, elevated the charge to a third degree felony. *Id*. at § 22.01(b)(2).

Adams filed a "Motion to Quash and Exception to Substance of Indictment" which asserted "that the indictment contains matters raising a legal defense which may bar the prosecution." He specifically claimed that a Washington court had vacated the conviction that was alleged in the indictment's enhancement paragraph. Consequently, Adams claimed that the district court here did not have jurisdiction over the charge, because it is was at best a misdemeanor.

The trial court took up the motion at a pretrial hearing. At the hearing, Adams' counsel offered what is described in the record as a scanned copy of an order vacating the conviction.[2] The State's prosecutor objected that the Washington order was not an original document, was not under seal, and was not authenticated. The trial court asked the State's attorney "for the sake of argument" to set aside those admissibility issues and address the substance of Adams' complaint. The State's attorney then argued that a motion to quash was not the proper means to raise this issue and the State should not have to prove an enhancement paragraph in a pretrial hearing. The trial court then questioned whether a successful challenge to the enhancement paragraph would

[2] Whatever that order may be, it is not a part of our record. Washington apparently has a procedure whereby a person who successfully completes probation may petition a court to "dismiss" the conviction. *In re Carrier*, 272 P.3d 209, 215 (Wash. 2012). It has a separate procedure for "vacating" a conviction. *Id.* at 216. Washington law changed with respect to these procedures in 2003, the year that Adams is alleged to have been convicted there. *Id*. at 217. We use the term "vacate" in this opinion only because the parties did below, and we express no opinion on how Washington law would actually classify the order at issue here.

deny the district court jurisdiction to hear the case. When the State's prosecutor returned to his position that the correctness of the enhancement paragraph was not before the court, the trial judge asked him to "skip that argument." At that point, the balance of the hearing focused on whether a vacated conviction under Washington law prevented either the admissibility of the conviction, or its use for enhancement purposes. The trial court later granted Adams' motion from which the State brings this appeal. *See* TEX. CODE CRIM.PROC.Ann. art. 44.0l(a)(l)(West Supp. 2015)(State's entitlement to appeal an order granting a motion to quash).

WAS THE WASHINGTON CONVICTION PROPER EVIDENCE OF THE JURISDICTIONAL ELEMENT OF THE FELONY OFFENSE?

In a single issue, the State contends the trial court erred in implicitly ruling that the Washington conviction was not available for use as the jurisdictional element of the felony offense. As subparts to this issue, the State contends the indictment is facially valid and the trial court lacked the authority to require it to prove up the conviction for jurisdictional enhancement purposes in a pretrial hearing.

We review a trial court's ruling on a motion to quash an indictment *de novo* because the sufficiency of a charging instrument is a question of law. *Smith v. State*, 309 S.W.3d 10, 13-14 (Tex.Crim.App. 2010); *State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App. 2004). Generally, when an indictment tracks the language of a statute, it will satisfy constitutional requirements. *State v. Mays*, 967 S.W.2d 404, 406 (Tex.Crim.App. 1998). A motion to quash, like other pretrial motions, cannot be used to argue that the prosecution is unable to prove one of the elements of the crime. *Lawrence v. State*, 240 S.W.3d 912, 916 (Tex.Crim.App. 2007); *Woods v. State*, 153 S.W.3d 413, 415 (Tex.Crim.App. 2005); *State v. Rosenbaum*, 910 S.W.2d 934, 948 (Tex.Crim.App. 1994)(dissenting op. adopted on reh'g). In other words, a pretrial proceeding

should not be a "mini-trial" on the sufficiency of the evidence to support an element of the offense. *Lawrence,* 240 S.W.3d at 916.

The issues here were directly addressed by this Court's opinion in *State v. Meadows*, 170 S.W.3d 617 (Tex.App.--El Paso 2005, no pet.). There, the defendant filed a pretrial motion to dismiss an indictment which, as here, enhanced an assault charge based on a prior family violence assault conviction. *Id.* Meadows contended that the prior assault did not involve family violence and therefore was ineligible for enhancement purposes. As such, he further contended that the district court lacked jurisdiction to hear the underlying misdemeanor assault charge. We disagreed on all counts.

We faulted the district court for considering as evidence the prior conviction at the pretrial hearing. *Id.* at 620. A charging instrument that is valid on its face and returned by a legally constituted grand jury is sufficient to mandate trial of the charge on its merits. *Id.* The sufficiency of an indictment cannot be supported or defeated by evidence at a pretrial hearing. *Rosenbaum*, 910 S.W.2d at 948; *Meadows*, 170 S.W.3d at 620; *State v. Boado*, 8 S.W.3d 15, 17 (Tex.App.--Houston [1st Dist.] 1999), *pet. dism'd improvidently granted*, 55 S.W.3d 621 (Tex.Crim.App. 2001). In the pretrial setting, there is neither constitutional nor statutory authority for a defendant to test--or for a trial court to determine--the sufficiency of evidence to support or defeat an element alleged in the indictment. *Rosenbaum*, 910 S.W.2d at 948; *Boado*, 8 S.W.3d at 17; *State v. Habern*, 945 S.W.2d 225, 226 (Tex.App.--Houston [1st Dist.] 1997, no pet.). If the trial court conducts such a hearing, it errs. *Rosenbaum*, 910 S.W.2d at 948.

We also faulted the district court for concluding that it lacked jurisdiction if the enhancement paragraph was struck. *Meadows*, 170 S.W.3d at 620. The presentment of an indictment vests a district court with jurisdiction. Tex. Const. art. V, § 12(b). District courts and

criminal district courts have original jurisdiction in felony cases. TEX.CODE CRIM.PROC.ANN. art. 4.05 (West 2015). When the face of the indictment charges a felony, the district court does not lose jurisdiction if the State is only able to prove a misdemeanor at trial. *See* TEX.CODE CRIM.PROC.ANN. art. 4.06; *Jones v. State,* 502 S.W.2d 771, 773-74 (Tex.Crim.App. 1973); *Meadows,* 170 S.W.3d at 620.

We have followed *State v. Meadows* on a number of occasions. *State v. Reyes*, 310 S.W.3d 59, 62 (Tex.App.--El Paso 2010, pet. ref'd); *Serrano v. State*, 08-08-00210-CR, 2010 WL 2163804, at *3 (Tex.App.--El Paso May 28, 2010, no pet.)(not designated for publication). *Meadows* itself necessarily follows from the Texas Court of Criminal Appeals decision in *State v. Rosenbaum,* 910 S.W.2d 934, 947-48 (Tex.Crim.App. 1994)(dissenting op. adopted on rehearing) which held that a trial court erred in taking testimony in a pretrial hearing to determine whether the State could prove the materiality of an alleged perjured statement. In his brief to this court, Adams makes the curious argument that we have erroneously relied on the "dissenting opinion" in *Rosenbaum* and that the majority opinion controls.[3] We beg to differ. On rehearing in *Rosenbaum*, a *majority* of the court wrote: "Judge Clinton's dissenting opinion on original submission is correct in its reasoning and its holding that in a pretrial setting there is neither Constitutional nor statutory authority for an accused to raise and for a trial court to determine sufficiency of evidence to support or defeat an alleged element of an offense such as 'materiality' in a perjury case." *Id*. at 948. The dissent, now the majority opinion, had specifically reasoned that an indictment can be facially tested against the law, but it "can not [sic] be supported or defeated by evidence presented at pretrial." *Id*. at 947-48.

[3] Adams' brief states: "Thus, the State's reliance on the Eighth District Court of Appeals' decision in *State v. Meadows*, 170 S.W.3d 617 (Tex.App.--El Paso 2005, no pet.) and *State v. Reyes*, 310 S.W.3d 59 (Tex.App.--El Paso 2010, pet. ref'd) is misguided because the analysis in these cases was improperly based on the dissenting opinion in *State v. Rosenbaum*, 910 S.W.2d 934 (Tex.Crim.App. 1994), rather than the majority opinion in that case."

Because that is precisely what appears to have occurred here, the trial court erred in necessarily considering evidence of an order vacating the Washington indictment and then concluding the absence of admissible evidence of the conviction deprived it of jurisdiction.

Adams raises several peripheral challenges to the State's appeal, many of which we have addressed above. The remainder we group as follows.

Adams first contends that the State has not effectively appealed anything because it does not challenge the underlying order quashing the indictment. We disagree. The State's single issue on appeal challenges the trial court's "implicit ruling" which we interpret as the order granting the motion to quash. The State's prayer for relief asks that we reverse that order.[4]

Adams also asserts that the State confessed error, or judicially admitted at the hearing that there was no final conviction supporting the enhancement paragraph. The exchange he refers to includes this question from the bench:

> COURT: "Let me ask the State this. Are you conceding that this is not a conviction, whatever it is, vacated or --
>
> PROSECUTOR: "Yes, Judge."

But the context of the discussion which follows included the State's argument that the Washington vacatur is akin a deferred adjudication conviction in Texas. The State contended that as such, the vacated conviction could operate to support the enhancement paragraph.[5]

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[4] A more germane question might relate to the order itself, which only states that the "Motion to Quash and Exception to Substance of the Indictment . . . is hereby: (Granted)." An "order" should do just that: it should order that something specific be done rather than merely grant a motion, which then sends the reader back to the motion to see what relief that motion sought.

[5] Much of the discussion focused on how Washington would view the conviction under its statutes and laws. We note, however, TEX.PENAL CODE ANN. § 22.01(f)(1)(West Supp. 2015) has explicit text addressing how probated convictions should be treated. This language is similar to that in TEX.PENAL CODE ANN. § 12.42(g)(1)(West 2011) which the Court of Criminal Appeals interpreted in *Ex parte White*, 211 S.W.3d 316, 320 (Tex.Crim.App. 2007) in the context of a probated out of state conviction used for punishment enhancement purposes. The court found because the Texas statute addressed the issue of how probated sentences should be handled, it was unnecessary to resolve the issue under the laws of the foreign state. *Id*. at 320, n.4.

A judicial admission must be a "clear, deliberate, and unequivocal statement." *Regency Advantage Limited Partnership v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996); *Texas Dept. of Pub. Safety v. Bonilla*, 08-13-00117-CV, 2014 WL 2451176, at *5 (Tex.App.--El Paso May 30, 2014, pet. filed); *Spradlin v. State*, 100 S.W.3d 372, 380 (Tex.App.--Houston [1st Dist.] 2002, no pet.). We would expect no less from a confession of error. On this record, we cannot say the State was clearly admitting or confessing that the Washington conviction was not a conviction, at least for the purposes of jurisdictional enhancement.

Adams also argues the State waived error by not objecting to the trial court's consideration of extrinsic evidence. He further claims the State invited the error by itself requesting the trial court to consider extrinsic evidence. He bases this claim on the prosecutor's statement (after making multiple evidentiary objections to the order vacating the conviction) that "I would have no objection if that was the correct document, but it's not." At a later point in the hearing, the prosecutor marked and offered a Washington statute and a published decision from the Washington Supreme Court, both of which address the effect of vacating a criminal judgment.

To preserve error for appellate review, a party must state "the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." TEX.R.APP.P. 33.1(a)(1)(A). No "hyper-technical or formalistic use of words or phrases" is required in order for an objection to preserve an error; instead, the objecting party must "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Pena v. State*, 285 S.W.3d 459, 464 (Tex.Crim.App. 2009), *quoting Lankston v. State*,

827 S.W.2d 907, 909 (Tex.Crim.App. 1992). We agree with Adams that the State, like any party, is required to preserve error when it is the losing party in the trial court, and failing to do so risks forfeiture of a position. *State v. Rhinehart*, 333 S.W.3d 154, 160 (Tex.Crim.App. 2011)(error in granting motion to quash was not a systemic issue and thus required proper objection from State). We simply believe that the State made an objection below that was understood by the trial court.

The State's prosecutor objected to the admission of the vacatur order under various rules of evidence. The trial court then asked the State's prosecutor "for the sake of argument" to respond to Adams' claim. In doing so, the prosecutor stated:

> Going past that, assuming the Court would admit that into evidence, I still would argue that this is --a motion to quash is not the proper mechanism to try to fight this aspect of the indictment. . . . The purpose of a motion to quash, it's basic. It's to say there's not enough here for us to defend this case. That is what a motion to quash is for. It is not an evidentiary issue of whether we can prove our enhancements. That's not the purpose of a motion to quash."

The trial court then raised the raised the jurisdiction issue. The State's prosecutor then re-urged that "whether the enhancement is correct or not, that aspect is not an issue -- it is not a proper issue before this Court." The trial court then asked the prosecutor to "skip that argument." It seems apparent to us that the trial court understood, but simply disagreed with the State's position that the motion to quash was an improper vehicle to raise the arguments asserted here. *See Lankston*, 827 S.W.2d at 910 (appellate court may consider interaction of counsel and trial court to determine if issue was preserved).

Nor do we view the State's offer to admit the copy of a statute and published appellate decision as the kind of "invited error" that would forfeit its argument. We see a fundamental difference between offering an out-of-state judgment into evidence, and tendering a copy of a statute or published case to the court so the court can take judicial notice of another state's law.

TEX.R. EVID. 202 in fact expressly contemplates supplying the court with necessary information to take notice of another state's law.

Finally, Adams contends that there is error on the face of the indictment because the enhancement paragraph alleges a prior conviction "under section 22.01 of the Texas Penal Code" but the prior conviction alleged here was a Washington conviction. He further contends that Section 22.01 in fact requires a prior conviction under Texas law, and not that of another state. Alternatively, he contends the two clauses in the indictment paragraph conflict and deny him fair notice of the what is being alleged.

Aside from the fact that Adams advanced none of these particular arguments to the trial court below, we disagree with the premise running throughout each that an out-of-state conviction cannot serve as the basis for enhancement of a family violence assault. The assault statute itself expressly contemplates that an out-of-state conviction might be used. TEX.PENAL CODE ANN. § 22.01(f)(2)("For the purposes of Subsections (b)(2)(A) and (b-1)(2): . . . a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed."). In this regard, Section 22.01 is structured identically to Section 12.42(g)(1) which allows use of out-of-state convictions to enhance a punishment range. Courts are familiar with the well-worn path of determining if an out-of-state conviction is for an offense "substantially similar" to the applicable Texas counterpart. *See e.g. Ex parte White*, 211 S.W.3d 316, 319-20 (Tex.Crim.App. 2007)(finding probated Delaware conviction could serve as basis for enhancing punishment); *Hill v. State*, 392 S.W.3d 850, 859 (Tex.App.--Amarillo 2013, pet ref'd)(determination that prior Oklahoma conviction was substantially similar to Texas statute).

It is incorrect to say that the indictment is either vague or defective on its face because it utilizes an out-of-state conviction.

Finding no merit in Adams' procedural challenges to the State's issue on appeal, and further finding the principles that we announced in *State v. Meadows* control here, we sustain issue one and reverse the trial court's granting the motion to quash and remand the case for further proceedings not inconsistent with this opinion.

January 27, 2015

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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