Affirmed as Reformed; Opinion Filed January 28, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00010-CR

LARRY DON MOSLEY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F13-71324-I

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Evans

Appellant Larry Don Mosley appeals from the judgment adjudicating him guilty of indecency with a child and his accompanying sentence of life imprisonment. Appellant asserts the following issues: (1) the denial of his right to a public trial during the voir dire portion of the trial; and (2) the judgment should be reformed to reflect that appellant entered a plea of "not true" to the enhancement allegation. We find no merit in appellant's first argument but sustain the second issue and reform the judgment to reflect that appellant entered a plea of "not true" to the enhancement allegation. We affirm the trial court's judgment as reformed.

BACKGROUND

A thirteen year old girl informed her mother that appellant had sexually molested her when she visited him in Dallas. Appellant was indicted for, and a jury convicted him of, the

second degree felony offense of indecency with a child. As the indictment alleged a prior conviction for sexual assault of a child, appellant was automatically sentenced to life imprisonment.

ANALYSIS

A. Violation of Right to a Public Trial

Appellant argues that because seventy-seven persons were summoned for jury selection, there was no room in the courtroom for other citizens to view the voir dire. Appellant asserts that he was deprived of his constitutional right to a public trial. We disagree.

As an initial matter, we note that appellant did not preserve this argument as he failed to make an objection before the trial court. An appellant must demonstrate that he made a timely request, objection, or motion before the trial court and obtained a ruling to preserve error for appeal in accordance with Rule 33.1 of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 33.1(a); *Peyronel v. State*, 465 S.W.3d 650, 654 (Tex. Crim. App. 2015) (holding that appellant was not required to use "magic language" to preserve his public trial complaint for review but appellant had to state the grounds for the ruling sought from the trial court with sufficient specificity to make the trial court aware of the complaint).

However, even if appellant had preserved this argument, appellant has not provided any evidence that the trial court actually excluded the public. The Sixth Amendment of the United States Constitution guarantees an accused the right to a public trial in all criminal prosecutions. U.S. Const. amend. VI. The right to a public trial, however, is not absolute and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, or ensuring that a defendant receives a fair trial. *Lilly v. State*, 365 S.W.3d 321, 328 (Tex. Crim. App. 2012). To rebut the presumption of openness and to allow closure of an accused's trial, or any part thereof, the following must occur: (1) the party

seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. *Id.* at 328-29 (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984)). Thus, the first step for a reviewing court when analyzing whether a defendant's right to a public trial was violated is to determine if the trial was, in fact, closed to the public. *Lilly*, 365 S.W.3d at 329. Here, appellant relies upon another Dallas case in which the trial court excluded members of the public during voir dire because the sixty-five venirepersons took up all the seats in the gallery of the same courtroom in which appellant's trial was held. *See Wilson v. State*, No. 05-11-00179-CR, 2012 WL 2149406, at *7-8 (Tex. App.—Dallas 2012, no pet.) (mem. op.) (not designated for publication). Appellant concludes that because his case had twelve more venirepersons in the exact same courtroom whom, he argues, filled the jury box in addition to the gallery, there was no room for the public to attend voir dire and, therefore, the public was excluded. Appellant, however, cites to nothing in the record which demonstrates that the trial court actually excluded anyone, including a member of the public, from voir dire. *Cf. id.* (members of public including some of appellant's family members excluded from courtroom during voir dire). As such, appellant cannot demonstrate that a violation of his right to a public trial occurred and we overrule appellant's first issue.

B. Reformation of Judgment

In his second issue appellant asserts, and the State agrees, that the judgment incorrectly reflects that appellant pleaded true to the enhancement paragraph and that the judgment should be reformed to reflect the appellant's actual plea of "not true." We agree.

The indictment contained a single enhancement paragraph alleging a prior felony conviction. The record reflects appellant entered a plea of "not true" to this paragraph. The

judgment, however, incorrectly contains a plea of "true" to the enhancement paragraph. In cases such as these, where the necessary data and information is available, we have the authority to modify the incorrect judgment. *See* TEX. R. APP. P. 43.2(b); *Villegas v. State*, No. 05-12-01397-CR, 2014 WL 1414311, at *2 (Tex. App.—Dallas Apr. 3, 2014, no pet.) (mem. op.); *Estrada v. State*, 334 S.W.3d 57, 63 (Tex. App.—Dallas 2009, no pet.) ("This Court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information to do so."); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). Accordingly, we sustain appellant's second issue and modify the judgment to a plea of "not true" with respect to the enhancement paragraph.

CONCLUSION

We reform the trial court's judgment to correctly reflect a change from "true" to "not true" with respect to the first enhancement paragraph. As reformed, we affirm the trial court's judgment.

/ David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LARRY DON MOSLEY, Appellant

No. 05-15-00010-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2, Dallas County, Texas
Trial Court Cause No. F13-71324-I.
Opinion delivered by Justice Evans.
Justices Francis and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> to change the plea of "true" to "not true" with respect to the first enhancement paragraph.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 28th day of January, 2016.