MODIFY and AFFIRM; and Opinion Filed September 25, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01065-CR

DONALD RAY GIPSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 6
Dallas County, Texas
Trial Court Cause No. F15-55009-X

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

Donald Ray Gipson was charged with driving while intoxicated (DWI), elevated to a felony by two prior DWI convictions. *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(b)(2) (West Supp. 2016). The State also sought to enhance Gipson's punishment based on two prior felony convictions, the first for possession of a controlled substance with intent to deliver and the second for burglary. *See id.* § 12.42(d) (West Supp. 2016). At trial, however, the State abandoned the second alleged enhancement. The jury found Gipson guilty of felony DWI, made an affirmative finding a deadly weapon was used during the commission of the offense, found the first alleged enhancement was true, and assessed punishment of fifteen years' imprisonment. In one issue, Gipson contends the trial court erred by failing to include in the jury charge an instruction on the lesser included offense of misdemeanor DWI. We modify the trial court's judgment to reflect Gipson pleaded not true to the first alleged enhancement, the jury found the

first alleged enhancement was true, and there was not a second alleged enhancement. As modified, we affirm the trial court's judgment.

Background

After his vehicle crashed into a house on May 31, 2015, Gipson was arrested for DWI. A blood sample taken three hours after the accident showed Gipson's blood alcohol content was 0.254, more than three times the statutory level for establishing intoxication. *See* TEX. PENAL CODE ANN. § 49.01(2)(B) (West 2011). Gipson was indicted for DWI, "3rd of more," and the indictment specifically alleged he had two prior DWI convictions: (1) a November 20, 1992 conviction in cause number "MA9127619" in County Criminal Court No. 5 of Dallas County, Texas; and (2) a May 22, 1986 conviction in cause number "MB8641619" in County Criminal Court No. 8 of Dallas County Texas. The indictment also alleged Gipson used a deadly weapon, a motor vehicle, during the commission of the May 31, 2015 offense and sought to enhance Gipson's punishment based on two prior felony convictions, the first for possession of a controlled substance with intent to deliver and the second for burglary.

To establish Gipson committed the offense as charged, the State was required to prove Gipson operated a motor vehicle in a public place while intoxicated and had previously been convicted twice of DWI. *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(b)(2). The two prior DWI convictions were elements of the charged offense and were necessary to establish the May 31, 2015 offense qualified as felony DWI. *Ex parte Benson*, 459 S.W.3d 67, 75 (Tex. Crim. App. 2015); *Gibson v. State*, 995 S.W.2d 693, 696 (Tex. Crim. App. 1999). To prove these elements, the State offered evidence of Gipson's two prior DWI convictions through a certified computer printout from the Dallas County computer system, a certified driving abstract from the Texas Department of Public Safety (DPS), and testimony from Delta Oldfield, a legal secretary and deputy custodian of records for the DPS. This evidence referred to the cause number for the

1986 conviction as "0086-41619-J," "00-86-4161-J," "0086-41619J," "008641619J," "M8641619," and "MB8641619," and the cause number for the 1992 conviction as "MA91-27619-F," "MA9127619F," "M9127619," and "MA9127619."

Analysis

Gipson contends that, in order to establish the two prior DWI convictions, the State's evidence concerning the two convictions was required to "match the indictment and provide proof they were attributed" to him. Relying on the inconsistencies in the evidence as to the cause number of the 1986 DWI conviction, he argues he was entitled to a jury instruction on the lesser included offense of misdemeanor DWI because there was some evidence, however slight, that the State failed to prove one of the jurisdictional paragraphs.

The trial court has a duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007) ("[T]the judge shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case[.]"). This includes the duty to instruct the jury on the law applicable to the case even if defense counsel fails to object to inclusions or exclusions in the charge. *Taylor v. State*, 332 S.W.3d 483, 486 (Tex. Crim. App. 2011). However, a jury instruction on a lesser included offense is not "applicable to the case" absent a request by the defense for its inclusion in the jury charge, *Tolbert v. State*, 306 S.W.3d 776, 781 (Tex. Crim. App. 2010), and the trial court does not have a duty to *sua sponte* instruct the jury on a lesser included offense, *id.*; *Delgado*, 235 S.W.3d at 249–50. A defendant who did not request an instruction on a lesser included offense waives his right to complain on appeal that the trial court was required to give the instruction. *Tolbert*, 306 S.W.3d at 781 (citing 43 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE § 36.50 at 202 (Supp. 2006)); *see also Vega v. State*, 394

S.W.3d 514, 519 (Tex. Crim. App. 2013) ("A defendant cannot complain on appeal about the trial judge's failure to include a defensive instruction that he did not preserve by request or objection: he has procedurally defaulted any such complaint.").

Gipson's defense at trial was that he was neither intoxicated nor operating his vehicle at the time it was involved in the accident on May 31, 2015. He neither requested an instruction on the lesser included offense of misdemeanor DWI nor objected to the trial court's failure to include such an instruction in the jury charge. Accordingly, he cannot now complain on appeal about its absence from the charge. *Tolbert*, 306 S.W.3d at 781; *see also Vega*, 394 S.W.3d at 519. We resolve Gipson's issue against him.

Modification of Judgment

We may modify a trial court's written judgment to correct a clerical error when we have the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). The trial court's judgment in this case reflects there was not a first alleged enhancement, Gipson pleaded true to the second alleged enhancement, and the second alleged enhancement was found to be true. The record reflects, however, that Gipson pleaded not true to both alleged enhancements, the State abandoned the second alleged enhancement based on a prior conviction for burglary and proceeded solely on the first alleged enhancement based on a prior conviction for possession of a controlled substance with the intent to deliver, and the jury found the first alleged enhancement was true. Accordingly, we modify the trial court's judgment to reflect Gipson pleaded "not true" to the first alleged enhancement, the jury found the first alleged enhancement was "true," and both the plea and the finding as to the second enhancement were "N/A."

As modified, we affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DONALD RAY GIPSON, Appellant

No. 05-16-01065-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 6, Dallas County, Texas, Trial Court Cause No. F15-55009-X. Opinion delivered by Justice Fillmore, Justices Bridges and Stoddart participating.

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

That section of the trial court's judgment entitled "Plea to 1st Enhancement Paragraph" is modified to state "Not True."

That section of the trial court's judgment entitled "Findings on 1st Enhancement Paragraph" is modified to state "True."

Those sections of the trial court's judgment entitled "Plea to 2nd Enhancement/Habitual Paragraph" and "Findings on 2nd Enhancement/Habitual Paragraph" are modified to state "N/A."

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

Judgment entered this 25th day of September, 2017.