MODIFY, REFORM, and AFFIRM; and Opinion Filed December 20, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00244-CR

No. 05-17-00245-CR

HIEU ANTHONY TRAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause Nos. F-1530243-K & F-1530244-K

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Lang-Miers

In two companion cases arising out of the same criminal episode, Appellant was convicted of burglary of a habitation with intent to commit aggravated assault and aggravated assault with a deadly weapon. He was sentenced to eighty years' imprisonment on the aggravated assault case and to sixty years' imprisonment on the burglary case. In his sole issue on appeal, appellant claims that the trial court erred by allowing evidence of his prior convictions to be used in the event he testified during the guilt/innocence phase of the trial. In a cross-point, the State asks this Court to reform the judgments to reflect that Appellant entered pleas of "not true" to the enhancement allegation in both cases and to redact the incorrect plea and finding to a second enhancement allegation in Cause No. F-1530243-K. We modify the judgments of the trial court and affirm both convictions as modified.

Background

About 11:00 a.m. on March 8, 2015, Josie Rios and her husband were in the living room of their home in Grand Prairie, Texas, when she saw a man walking in the backyard. She told her husband, Alvin, who saw the shadow of somebody pacing through the curtain of their sliding glass door. As Alvin went to investigate, they both heard someone kicking the door. Alvin pulled the curtain open and recognized appellant, who was their neighbor.

Alvin was shocked and "kind of irate." Alvin asked appellant what he was doing. Appellant made eye contact with Alvin, then pulled out a gun and shot it, shattering the sliding glass door. The gun was only an inch or two from the door itself and was pointed directly at Alvin, who thought he was going to die.

Appellant entered the Rios home and stood in the living room. As Alvin was backing away, appellant re-cocked the gun and pointed it at Alvin. Alvin ran to the front door and started trying to unlock it to get away; he hoped appellant would follow him so he could lead him away from his wife and daughter. Alvin said "please don't shoot me. Don't shoot me in my back." Appellant did not say anything to Alvin during this entire incident.

Josie and the Rios' daughter were screaming as they tried to run to safety in the kitchen. Appellant took a step forward, turned, and pointed the gun at Josie and her daughter. Josie was in imminent fear of serious bodily injury or death and was scared for her daughter. Appellant spoke to Josie in Spanish, saying "keep it up." He then ran out the door and around the back of the house.

Josie called 911 and the police responded. Appellant was taken into custody a short time later. A search warrant was executed on his house, which was directly behind the Rios home.

A video from a home security surveillance system operated by another neighbor showed a person climbing over the fence and jumping into the Rios' backyard. Approximately a minute and

20 seconds later, the same recording showed a person coming out of that same backyard and climbing back over the fence. Alvin identified appellant from this video.

A crime scene investigator with the Grand Prairie police department located a copper jacket and a projectile in the northeast corner of the dining room, just northwest of the point of entry. The casing revealed that it was a .380 caliber manufactured by Federal.

In early May of 2015, Teresa Balderas, Appellant's common law wife of eight years, found a handgun, a Smith & Wesson .380 pistol, in the attic of the house she and appellant had shared. Balderas turned the gun over to the lead detective. Subsequent forensic analysis revealed that the cartridge casing recovered from the Rios home was fired from the same gun that Balderas found in the attic.

The Rios were only casually acquainted with appellant. They had no previous bad history with appellant and nothing bad had happened between them. Nothing was taken from their home and there was no other intruder. Appellant had no permission to be in their home.

Motion to Testify Without Impeachment

As part of his pre-trial "omnibus" motion, appellant requested that he be allowed to testify at the guilt/innocence stage of the trial "free from impeachment" by "any or all of his prior convictions as well as any extraneous offenses that the State has given notice of intent to use for such purposes." The State had given timely notice of a possible eleven extraneous offenses. While Appellant generally argued relevancy and that the prejudicial effect of impeachment by any of these offenses would outweigh any probative value, appellant specifically argued that four of the extraneous offenses were stale in that they were over 10 years old. In support of these arguments, appellant relied on Rule 609(b) of the Texas Rules of Evidence which provides that, if more than 10 years have passed since a witness's conviction or release from confinement for it, whichever is

later, evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. TEX. R. EVID. 609(b).

At the close of the State's case-in-chief, a hearing was held outside the presence of the jury on appellant's motion. Appellant specifically argued that four of the extraneous offenses listed in the State's notice were inadmissible because they were over ten years old. TEX. R. EVID. 609(b). The trial court denied this portion of Appellant's omnibus motion. As that court stated: "I'm not going to allow him to testify free of impeachment."

Following the trial court's denial of his motion, Appellant testified, outside the presence of the jury, that he had been fully informed of his right to testify and put on notice that, in light of the trial court's ruling, the State could impeach him with his criminal record. He chose not to testify at the guilt/innocence phase of the trial, though Appellant did testify at the punishment hearing.

The United States Supreme Court, in *Luce v. U.S.*, 469 U.S. 38, 43 (1984), held that in order to raise and preserve a claim for appellate review of improper impeachment of a defendant with a prior conviction the defendant must take the stand and testify at trial. The Court noted that, without a defendant's testimony, an appellate court would be required to speculate about the following: (1) the precise nature of the defendant's testimony; (2) whether the trial court's ruling would have remained the same or would have changed as the case unfolded, (3) whether the prosecution would have sought to impeach the defendant with the prior conviction, (4) whether the accused would have testified in any event, and (5) whether any resulting error in permitting impeachment would have been harmless. *Id*., at 41-42.

Texas has adopted the rule in *Luce* and applied the same reasoning. *Jackson v. State*, 992 S.W.2d 469, 479 (Tex. Crim. App. 1999); *Caballero v. State*, 919 S.W.2d 919, 923 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd). This Court has also addressed this issue on multiple occasions and has likewise concluded that a defendant's failure to testify preserves nothing for

review. *See Jones v. State*, No. 05-08-01562-CR, 2010 WL 2089659, at *4 (Tex. App. – Dallas May 26, 2010, no pet.) (not designated for publication); *Clark v. State*, No. 05-05-00932-CR, 2007 WL 659837, at *3 (Tex. App. – Dallas March 6, 2007, no pet.) (not designated for publication); *Holloway v. State*, No. 05-05-01117-CR, 2006 WL 1545379, at *2 (Tex. App. – Dallas June 7, 2006, pet. ref'd) (not designated for publication); *Ford v. State*, No. 05-04-00253-CR, 2005 WL 957917, at *5 (Tex. App. – Dallas April 27, 2005, no pet.) (not designated for publication).

Appellant argues that, because he testified at the punishment phase of the trial, the *Luce* ruling does not apply. At the punishment phase, appellant testified that he was chasing an intruder, whom he had just caught being intimate with his wife, across his fence line into the Rios house. He denied that he had a gun on his person. He testified that the glass on the Rios door was already shattered when he arrived. Based on this testimony, appellant argues that this Court can know the following: the precise nature the testimony he would have given at the guilt/innocence phase of the trial, the definitiveness of the trial court's ruling, the certainty that the State would have impeached appellant with his prior convictions, and the conclusion that appellant refrained from testifying at the guilt/innocence phase solely because of the trial court's ruling. Appellant further argues that this Court can evaluate the harm at the guilt/innocence phase from his testimony at the punishment phase because it is known what his testimony would have been. We do not agree.

This Court cannot assume that, had appellant chosen to testify at the guilt/innocence phase of the trial, his testimony would have been identical to his testimony at the punishment phase of the trial. Because appellant's testimony followed both the jury's guilty verdict and the State's presentation of extraneous offense evidence, appellant was in a different position than if had he testified prior to the verdict with only the prospect of impeachment by those same extraneous offenses. This Court would also need to speculate as to whether the trial court would have ruled that any extraneous offenses offered into evidence by the State were admissible. The trial court's

exact ruling was that it would not allow appellant to testify "free of impeachment;" the trial court did not rule specifically that any given extraneous offense would be admissible for impeachment if the State chose to offer it into evidence. Nor can it be known with certainty from this record whether the prosecution would actually have sought to impeach appellant with any of his prior convictions at the guilt/innocence phase. Consequently, this Court could only speculate as to what harm, if any, would ensue by permitting impeachment. These impermissible speculations are exactly what the *Luce* ruling is designed to prevent.

Because appellant chose not to testify, he has not preserved this complaint for appellate review. We overrule this issue.

Reformation of Judgments

The State requests that this Court reform the judgments in each case because those judgments both incorrectly recite that appellant entered pleas of "true" to the enhancement allegation. The State further requests that this court redact the incorrect plea and finding recitations to a second enhancement allegation contained in the judgment in Cause No. F-1530243-K.

At the punishment phase of the trial, the State alleged one enhancement, *i.e.*, that appellant had been previously convicted of aggravated assault with a deadly weapon. Appellant entered pleas of "not true" to this allegation. The judgments in both cases, however, reflect that appellant entered pleas of "true" to this allegation.

The indictment in Cause No. F-1530243-K originally alleged two enhancement paragraphs. The State proceeded, however, on only one enhancement allegation and the jury was charged to find only one enhancement paragraph "true" or "not true" in that case. The jury returned a finding of "true." There was no second enhancement paragraph which required either a plea by appellant or a finding by the trial court.

An appellate court has the authority to modify incorrect judgments when the evidence necessary to correct a judgment appears in the record. 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). We resolve the State's cross-point in its favor and reform the judgments to reflect that appellant pled "not true" to the enhancement paragraph in both cases. We further modify the judgment in Cause No. F15-30243-K to delete both the pleading and the finding of "true" to the second enhancement paragraph.

Conclusion

As reformed, we affirm the trial court's judgments.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

HIEU ANTHONY TRAN, Appellant	On Appeal from the Criminal District Court No. 4, Dallas County, Texas
No. 05-17-00244-CR V.	Trial Court Cause No. F-1530243-K.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Stoddart participating.

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

> The judgment of the trial court is REFORMED to reflect that appellant entered a plea of "not true" to the enhancement paragraph. Further, the judgment of the trial court is MODIFIED to delete both the pleading of "true" and the finding of "true" to the second enhancement paragraph.

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

Judgment entered this 20th day of December, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

HIEU ANTHONY TRAN, Appellant	On Appeal from the Criminal District Court No. 4, Dallas County, Texas
No. 05-17-00245-CR V.	Trial Court Cause No. F-1530244-K.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Stoddart participating.

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

The judgment of the trial court is REFORMED to reflect that appellant entered a plea of "not true" to the enhancement paragraph.

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

Judgment entered this 20th day of December, 2017.