AFFIRMED as MODIFIED and Opinion Filed November 10, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01035-CR

GUILLERMO SUAREZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1800665-V

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Reichek
Opinion by Justice Reichek

Guillermo Suarez appeals his conviction for manslaughter. Bringing four issues, appellant contends (1) the evidence was legally insufficient to support the jury's finding of "true" to one of the enhancement allegations in the indictment, (2) the trial court erred in failing to define the term "final" in the jury charge, (3) the trial court failed to properly admonish him about changing his plea, and (4) he received ineffective assistance of counsel at the motion for new trial stage of the proceedings. For the reasons that follow, we affirm the trial court's judgment.

Background

On April 21, 2018, appellant drove his vehicle the wrong way on interstate highway 20 while under the influence of controlled substances and crashed into a car being driven by Amberly McCray, killing her. Appellant was indicted for manslaughter and the indictment contained three enhancement allegations. The first allegation was that appellant used or exhibited a deadly weapon, specifically a motor vehicle, during the commission of the offense or his immediate flight afterwards. The second and third enhancement allegations were prior convictions; one for aggravated assault with a deadly weapon and the other for family violence assault.

Appellant originally pleaded not guilty to the manslaughter offense, but changed his plea to guilty after the State presented its evidence at trial. When appellant informed the trial court that he wished to change his plea, the judge told him they were first "going to go over [his] rights." The judge began by reminding appellant of the presumption of innocence and that he had an absolute right to plead not guilty. The judge then informed appellant of the range of punishment applicable to his offense and the effect of the enhancement allegations on the range of punishment and his eligibility for parole and probation. The court reviewed the voluntariness of appellant's judicial confession in which appellant stated he committed the offense as charged in the indictment, including the use or exhibition of a deadly weapon. The court further reviewed appellant's right to testify at the punishment phase of trial, and that if he was not a citizen of the United States, there

was a possibility that he could be deported. After appellant acknowledged his understanding of his rights, the court accepted his guilty plea, admitted the judicial confession, and proceeded to the punishment phase.

Appellant pleaded not true to the prior conviction enhancement allegations made in the indictment. In support of those allegations, the State submitted certified copies of the judgments of conviction and sentences in each case. The judgment for the offense of aggravated assault with a deadly weapon showed appellant was convicted and sentenced on December 22, 2016. The date of the offense was December 3, 2013. The judgment for the family violence assault offense showed appellant was convicted and sentenced on August 22, 2012 and the date of the offense was October 7, 2008.

The court's charge instructed the jury that, if it found from the evidence beyond a reasonable doubt that appellant was finally convicted of the offense of aggravated assault with a deadly weapon prior to committing the manslaughter offense at issue in this case, then it should find the first prior offense allegation true. If, however, the jury had reasonable doubt, it was instructed to find the allegation not true. The court similarly instructed the jury that it should find the second prior offense allegation true only if it found beyond a reasonable doubt that appellant was finally convicted of the family violence assault offense before he committed the offense of assault with a deadly weapon as alleged in the first enhancement. In its

verdict, the jury found both prior offense allegations true and sentenced appellant to life in prison.

The same day appellant was convicted, his counsel filed a motion for new trial asserting that "the verdict is contrary to the law and evidence." The trial court denied the motion and this appeal followed.

Analysis

I. Finality of Prior Convictions

In his first issue, appellant contends the evidence is legally insufficient to support the jury's finding that the enhancement allegation concerning his prior aggravated assault conviction was true. Appellant argues the proximity of the date of the judgment in the aggravated assault case to the date he committed the manslaughter offense precludes the presumption that the judgment in the aggravated assault case was "final" before he committed the manslaughter offense. Appellant sets out a timeline to show that an appeal of the judgment in the aggravated assault case could still have been pending at the time McCray was killed. Without specific evidence of finality, appellant contends the jury's finding that the aggravated assault conviction and sentence rendered on December 22, 2016 was final on or before April 21, 2018 was necessarily speculative. In making this argument, appellant relies on the court of criminal appeals opinion in *Jones v. State*, 77 S.W.3d 819 (Tex. Crim. App. 2002). Appellant's reliance is misplaced.

In *Jones*, the court of criminal appeals held that, when the State offers into evidence a certified copy of a judgment and sentence, it has made a prima facie showing that the conviction reflected in that document is a final conviction absent any evidence to the contrary. *Id*. at 822. The court further held that the fact the appellant still had time to file an appeal of his prior conviction at the time he committed the offense at issue did not, by itself, affect the sufficiency of the certified judgment and sentence as proof of finality. *Id*. at 824. If a prior judgment has been set aside, vacated, or appealed, it is the defendant who bears the burden of offering some evidence to support that fact. *Id*. at 823.

By the time of the trial in this case, whether appellant had filed a timely notice of appeal in the aggravated assault case, thereby creating an issue regarding the finality of that conviction, was an ascertainable fact on which appellant bore the burden of proof. *See Milburn v. State*, 201 S.W.3d 749, 753 (Tex. Crim. App. 2006). Appellant failed to produce or point to any evidence in the record that a notice of appeal had, in fact, been filed in the aggravated assault case. As the court noted in *Jones*, the possibility of an appeal is not the fact of an appeal. *Jones*, 77 S.W.3d at 824. Because the record contains no evidence to show the aggravated assault conviction was appealed, the certified judgment and sentence was sufficient to support the jury's finding of finality. We resolve appellant's first issue against him.

In a related second issue, appellant contends the trial court erred in refusing to include a definition of the term "final" in the jury charge. Appellant argues that,

because the jury is generally permitted to accept or reject evidence presented at trial, an instruction on finality was required to allow the jury to "evaluate the merits of the State's evidence" regarding his prior convictions.

Although the jury is given significant deference in its credibility determinations, a jury's decision to accept or reject evidence must be rational in light of the totality of the record. *Braughton v. State*, 569 S.W.3d 592, 611 (Tex. Crim. App. 2018); *Brooks v. State*, 323 S.W.3d 893, 907 (Tex. Crim. App. 2010). "A jury is not permitted to disregard undisputed objective facts that can support only one logical inference." *Braughton*, 569 S.W.3d at 611.

Absent a notice of appeal, a conviction is final on the date the sentence is imposed. *Davy v. State*, 525 S.W.3d 745, 752 (Tex. App.—Amarillo 2017, pet. ref'd). The certified judgments and sentences submitted by the State in this case were prima facie evidence of the objective fact that appellant's convictions for aggravated assault and family violence assault were final on the dates they were rendered. *See Jones*, 77 S.W.3d at 822. Because there was no evidence in the record that either conviction was appealed, the only logical, non-speculative inference the jury could draw from the objective evidence presented was that the convictions were final on the date the sentences were imposed. There was no fact issue for the jury to resolve with respect to finality. Without a fact issue regarding finality, it was not error for the trial court to refuse to include a finality instruction in the charge. *See Davy*, 525 S.W.3d at 752 (trial court did not err in failing to define terms "final" and

"finally" in jury charge where appellant did not offer evidence showing prior convictions were appealed or otherwise not final). We resolve appellant's second issue against him.

II. Admonishments

In his third issue, appellant contends the trial court failed to sufficiently admonish him about the consequences of his plea. Specifically, appellant argues the court failed to substantially comply with article 26.13(a) of the Texas Code of Criminal Procedure. Of the six admonishments statutorily required to be given by the trial court before accepting a defendant's guilty plea, the court here gave only two: the range of punishment and the possibility of deportation if he was not a United States citizen. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a). The admonishments listed in article 26.13(a) are not constitutionally required, however, and the failure to give them is subject to a harm analysis. *High v. State*, 964 S.W.2d 637, 638 (Tex. Crim. App. 1998); *Cox v. State*, 113 S.W.3d 468, 470 ((Tex. App.—Texarkana 2003, pet ref'd). Where an admonishment is not material to the defendant's case, the failure to give it is generally harmless. *See Johnson v. State*, 712 S.W.2d 566, 568 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

Of the four admonishments the trial court failed to give, two concerned plea bargain agreements, one concerned sex-offender registration, and the last addressed the possibility of judicial clemency following community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a). None of these admonishments applied to

appellant's guilty plea, made without a plea bargain agreement, to the offense of manslaughter committed with a deadly weapon. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.054 (defendant not eligible for judge-ordered community supervision if there is affirmative deadly weapon finding). Appellant makes no showing that he was unaware of the consequences of his plea or that he was harmed or misled by the trial court's failure to give the admonishments that did not apply to his case. We resolve appellant's third issue against him.

III. Ineffective Assistance of Counsel

In his final issue, appellant contends he received ineffective assistance of counsel at the motion for new trial stage of the proceedings. Appellant argues the motion for new trial filed by his counsel was "generic" and "unpersuasive" to the extent that his counsel "failed to provide any meaningful assistance." Appellant notes that the motion for new trial filed by his counsel was a form motion challenging the sufficiency of the evidence to support the verdict even though he pleaded guilty to the offense. He further contends his counsel failed to subject the prosecution's case to meaningful adversarial testing, rendering the process itself entirely unreliable. Because of this, appellant argues he need not show prejudice to obtain a remand under the United States Supreme Court's opinion in *United States v. Cronic*, 466 U.S. 648 (1984).

This Court addressed a substantially identical argument in *Skinner v. State*, No. 05-17-00153-CR, 2018 WL 3545023 (Tex. App.—Dallas July 24, 2018, pet.

ref'd) (mem. op., not designated for publication). In *Skinner*, we concluded that *Cronic* did not apply to counsel filing a "form" motion for new trial. *Id*. at *10. We stated that counsel's failure to test the prosecution's case "must be complete" and "bad lawyering, regardless of *how* bad, does not support the . . . presumption of prejudice under Cronic." *Id*. (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002) and *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997)).

Instead, we applied the test for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). *Id*.; *see also Satterwhite v. Texas*, 486 U.S. 249, 257 (deprivation of right to counsel subject to harmless error analysis when deprivation did not contaminate "entire criminal proceeding"); *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007) (deprivation of adequate counsel at motion for new trial stage subject to harmless error or prejudice analysis). Under *Strickland*, an appellant claiming ineffective assistance of counsel bears the burden of proving by a preponderance of the evidence that (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88. Appellant has presented no argument to show what grounds his counsel should have raised in the motion for new trial or that the result of the proceeding would have different if he had done so. Because appellant has failed to meet his burden under *Strickland*, we resolve his fourth issue against him.

IV. Modification of Judgment

Although not raised by either party, the trial court's judgment indicates appellant pleaded "NOT GUILTY" to the offense despite the fact that he changed his plea to guilty during trial. This Court has the authority to modify the judgment to make the record speak the truth and may do so sua sponte. *See* TEX. R. APP. P. 43.2(b); *see also Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the trial court's judgment to reflect a plea of "GUILTY" and, as modified, we affirm.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GUILLERMO SUAREZ, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas
No. 05-19-01035-CR V.	Trial Court Cause No. F-1800665-V.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Reichek. Justices Whitehill and Pedersen, III participating.

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

In the portion of the judgment reflecting appellant's plea to the offense, the words "NOT GUILTY" are deleted and replaced with the word "GUILTY."

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

Judgment entered November 10, 2020