Opinion issued December 21, 2017.

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00606-CR

MICHAEL DANIEL BOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 3
Galveston County, Texas
Trial Court Case No. MD-0359851

MEMORANDUM OPINION

A jury convicted appellant Michael Daniel Bott of assault causing bodily injury[1] and the trial court assessed his punishment at 365 days' confinement in

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[1] TEX. PENAL CODE ANN. § 22.02(a)(1) (West 2011).

county jail and a $400 fine. The court suspended the sentence and placed Bott on community supervision for eighteen months. In two points of error, Bott argues that: (1) the trial court's judgment reflects that no finding of family violence was made in this case; and (2) if the trial court made an affirmative finding of family violence, then the trial court erred by not submitting the issue to the jury, and that the failure to submit this issue to the jury violated his right to a jury trial under article I, section 10 of the Texas Constitution. TEX. CONST. art. I, § 10.

We modify the trial court's judgment to reflect a finding of family violence and we affirm as modified.

Background

Bott was charged with intentionally, knowingly, or recklessly causing bodily injury to Hayley Isbell, a member of Bott's family, by striking her with his hand or hands. *See* TEX. PENAL CODE ANN. § 22.02(a)(1) (West 2011). Isabell testified that she and Bott had been in a dating relationship "on and off" for "about five and a half years" when the assault occurred and shared a child together. According to Isbell, Bott punched her in the face after an argument, leaving a visible bruise. The jury was instructed as to all of the elements of the misdemeanor offense of assault causing bodily injury, as set forth in the Penal Code; the jury was not asked to make a finding as to whether the charged offense involved family violence.

After the jury returned its guilty verdict, the trial judge stated, "The jury has returned a verdict of guilty. The Court is making a finding, affirmative finding of family violence in this matter." The trial judge then asked Bott if he understood that she was making an affirmative finding of family violence, and Bott said that he did. The trial court also gave Bott verbal and written notice that, because he had been convicted of a misdemeanor offense involving family violence, as defined by the Texas Family Code, it was unlawful for him to possess or transfer a firearm or ammunition. *See* TEX. CODE CRIM. PROC. art. 42.0131 (West Supp. 2017) (notice requirement). The written notice was signed the same day as the judgment.

Family Violence Finding

In his first point of error, Bott argues that the trial court's judgment does not reflect, or otherwise establish, that any factfinder made an affirmative finding that the convicted offense involved family violence. In his second point of error, Bott argues that if the trial court made an affirmative finding of family violence, then the trial court erred by not submitting the issue to the jury, and that the failure to submit this issue to the jury violated his right to a jury trial under article I, section 10 of the Texas Constitution. TEX. CONST. art. I, § 10.

A. Applicable Law

Texas Code of Criminal Procedure article 42.013 states that, "In the trial of an offense under Title 5, Penal Code, if the court determines that the offense

involved family violence, as defined by Section 71.004, Family Code, the *court shall* make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case." TEX. CODE CRIM. PROC. art. 42.013 (West 2006).

In *Butler v. State*, the Court of Criminal Appeals held that "the plain language of [article 42.013] assigns the responsibility for making the family-violence determination *solely* to the trial court." 189 S.W.3d 299, 302 (Tex. Crim. App. 2006) (emphasis added). A trial court is "statutorily obligated" by article 42.013 to enter an affirmative finding of family violence in its judgment, if it determines during the guilt phase of trial that the offense involved family violence. *Id.* The court further held that a defendant is not entitled to a jury finding on family violence under *Apprendi v. New Jersey* when the finding does not serve to increase the defendant's punishment. *See id.*; *see generally Apprendi v. New Jersey*, 530 U.S. 466, 477, 490, 120 S. Ct. 2348, 2362–63 (2000) (holding criminal defendants have Sixth Amendment right to have jury decide any fact that increases penalty for crime beyond prescribed statutory maximum, other than fact of prior conviction).

B. Analysis

The jury found Bott guilty of committing the offense of assault, which is an offense under Title 5 of the Penal Code. *See* TEX. PENAL CODE ANN. § 22.02(a)(1). After the jury returned its guilty verdict, the trial court stated on the record that it was making an "affirmative finding of family violence in this matter." Although the

assault is ordinarily a Class A misdemeanor, the offense is enhanced to a third-degree felony if the assault involves family violence, as defined by sections 71.0021, 71.003, and 71.005 of the Family Code and the defendant has certain prior convictions, including a prior conviction for assault on a family member. TEX. PENAL CODE ANN. § 22.01(b)(2)(A) (West Supp. 2017); TEX. FAM. CODE ANN. § 71.0021 (West Supp. 2017) (defining "dating violence" and "dating relationship"); *id.* § 71.003 (West 2014) (defining "family"); *id.* § 71.005 (West 2014) (defining "household").

The record reflects that Bott was charged with a single count of assault, and there is no indication in the record that Bott had been previously convicted of an offense involving family violence. Furthermore, the judgment reflects that Bott was convicted of Class A misdemeanor assault and the punishment assessed against him was within the punishment range allowed for such an offense. *See* TEX. PENAL CODE ANN. § 12.21 (West 2011).

Based on the record, we conclude that the trial court was statutorily obligated to include an affirmative finding of family violence in its judgment. *See Butler*, 189 S.W.3d at 301; *see also* TEX. CODE CRIM. PROC. ANN. art. 42.013. We further hold that Bott was not entitled to have the jury determine whether the offense he was convicted of involved family violence because such a finding could not have increased Bott's punishment in this case. *See Butler*, 189 S.W.3d at 302–03.

Bott challenges the *Butler* court's holding that only the trial court can make a family-violence finding pursuant to article 42.013 and invites us to overrule this holding. 189 S.W.3d at 302–03. Bott also argues that *Butler*'s holding that a defendant does not have constitutional right to a jury finding on family violence is limited to the Sixth Amendment to the U.S. Constitution and he suggests that the Texas Constitution offers broader protections to Texas defendants. Both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution provide criminal defendants the right to a trial by an impartial jury. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. The protection under the Texas Constitution is virtually identical to that offered by the U.S. Constitution with respect to such rights. *See Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998). The Texas Court of Criminal Appeals stated in *Jones* that "there is no significant textual difference between the two constitutional provisions which would indicate that different standards of protection should be applied, and we can conceive of no reason why the impartial-jury requirements in the two constitutions should be different." *Id.* (quoting *Marquez v. State*, 725 S.W.2d 217, 243 (Tex. Crim. App. 1987)).

We overrule Bott's first and second points of error.

Reformation of the Judgment

The State has asked us to reform the judgment to reflect an affirmative finding of family violence. We have the power to modify a judgment to make the record

speak the truth when we have the necessary information before us to do so. *See* TEX. R. APP. P. 43.2(b). Accordingly, we modify the trial court's judgment to include an affirmative finding of family violence.

Conclusion

We modify the trial court's judgment to reflect an affirmative finding of family violence and we affirm as modified.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale and Lloyd.

Do Not Publish. TEX. R. APP. P. 47.2(b).