Opinion issued March 1, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00879-CR

KENNETH LEE HAWKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1462163

MEMORANDUM OPINION

Appellant Kenneth Lee Hawkins was found guilty by a jury of the offense of sexual assault of a child. After finding the allegations in two enhancement allegations to be true, the trial court sentenced Appellant to life in prison.

Appellant raises two issues on appeal. He contends that the trial court erred in denying his request to suppress evidence of the complainant's pretrial identification of him, and he complains that the judgment of conviction incorrectly reflects that he pleaded true to the second enhancement allegation.

We affirm, as modified.

Background

On January 1, 1996, then-16-year-old S.G. lived in a facility that housed juveniles who were transitioning out of the juvenile justice system. To celebrate the holidays, the facility took the juvenile residents, including S.G., to a Houston park where they stayed all day. However, at the end of day, S.G. missed the van that brought the residents back to the facility. S.G. waited, but the van did not return.

S.G. knew that the facility was not close to the park, but she thought that she could find her way there and began walking. As she walked, S.G. was approached by a man who asked her if she wanted to smoke crack, and she said no. The man then asked her if she wanted to smoke marijuana, and she agreed. The man led her around a corner of a building where he started punching her in her face. When she screamed for help, he punched her harder. The man forced S.G. to pull her pants down, and he penetrated her vagina with his penis.

After the sexual assault, the man got up and ran away. Fearing that he would return to kill her, S.G. continued to watch the man as she got dressed. When he got to the end of the building, he turned and looked backed.

S.G. ran to a fast food restaurant, where the employees called the police. S.G. was taken to a hospital where a sexual assault nurse examiner (SANE) examined S.G. As part of the exam, the SANE used a swab to collect vaginal fluid from S.G. The SANE also collected other physical evidence from S.G., including a blood sample and her clothing. The SANE packaged these items and gave them to the Houston police officer who came to the hospital.

In 2004, the vaginal swabs taken from S.G. were tested for DNA evidence. A DNA profile was created from semen detected on the swab. At the end of 2013, Houston Police Officer Bartels received information about a DNA match to Appellant in S.G.'s case.

In 2014, Officer Bartels obtained a warrant to collect a saliva sample from Appellant to compare his DNA to the DNA profile obtained from the sperm found in the vaginal swab taken from S.G.. The results of the DNA comparison showed that Appellant could not be excluded as a contributor of the sperm DNA. More precisely, the results indicated that the probability that the sperm DNA belonged to someone other than Appellant, that is, a randomly-chosen, unrelated person, was

approximately 1 in 11 quintillion for Caucasians, 1 in 620 quadrillion for African Americans, and 1 in 64 quintillion for Southeast Hispanics.

Officer Bartels had some difficulty locating S.G. but ultimately found her. In 2015–nineteen years after S.G. was sexually assaulted–Officer Bartels assembled a photo array for S.G. to view. The array contained a booking photo of Appellant from 2014 when he was about 53 or 54 years old. The other men in array photos also appeared to be around 50 years old.

When she met S.G. to show her the photo array, Officer Bartels told S.G. that there had been a DNA match with a suspect. Before viewing the array, Officer Bartels provided S.G. with a "Witness Admonishment" form, which S.G. signed. Officer Bartels also read the admonishments contained in the form to S.G. The admonishments informed S.G. of the following:

> 1. The individual who committed the offense may or may not be present.
>
> 2. You are not required to select any individual and that it is equally important to clear persons not involved in the crime from suspicion as it is to identify persons believed to be responsible for the crime.
>
> 3. The investigation shall continue whether or not an individual is identified.
>
> 4. Individuals presented may not appear exactly as they did at the time of the incident because features such as head hair, facial hair, and clothing are subject to change.

Upon viewing the array, S.G. selected Appellant as the man who had sexually assaulted her in 1996 when she was 16 years old. Officer Bartels noted on the Witness Admonishment form that S.G. stated, "I'll never forget that nose [of her attacker]."

Appellant was indicted for the offense of sexual assault of a child. The indictment also contained two enhancement allegations regarding a 1986 conviction for aggravated assault and a 1996 conviction for robbery.

The guilt-innocence portion of the trial was tried to a jury in October 2016. Appellant objected to the admission of evidence of S.G.'s pre-trial identification of him in the photo array. During Officer Bartels's trial testimony, Appellant requested a hearing outside the presence of the jury regarding his objection.

At the hearing, Officer Bartels testified about (1) the procedure she used to assemble the photo array, (2) her presentation of the array to S.G., and (3) S.G.'s identification of Appellant in the array. On cross-examination, the defense asked Officer Bartels questions related to why she had selected a booking photo of Appellant from 2014, even though booking photos of Appellant were available for earlier years. The defense showed Officer Bartels a booking photo of Appellant from 2010 along with the 2014 photo used in the array. The defense averred that Appellant was "younger and closer in age to the time of the alleged assault" in the 2010 photo. The defense then asked Officer Bartels if Appellant looked different

from how he appeared in 2010. She responded "a little bit." She was asked if Appellant had fewer wrinkles in 2010, and she responded, "Maybe." Officer Bartels agreed that Appellant "probably . . . looked a lot different . . . in 1996" than he did in 2014. She also agreed that "it would have been more fair to show [S.G.] a lineup containing a photo of Appellant from 1996 with other men of similar age at that time period," but she explained that "I must have not had [a photo of Appellant] from 1996."

Officer Bartels responded affirmatively when asked if she had "attempt[ed] to locate a photograph of [Appellant] from 1996." She testified that she was aware that Appellant had been arrested in 1995 and 1996. She stated that she had seen photos of Appellant from that time period when she searched the police database looking for booking photos. Officer Bartels stated "if there was [a photo] from 1996, that would have been the one that I used," but "there may have even been an issue with [the] older photos[.]" She explained, [if] it's not a very good picture, then of course I wouldn't use the older photo." She said, "I would use a newer photo because it has to match all of the other photos."

S.G. also testified at the pretrial identification hearing, describing the identification process from her perspective. When asked how long it took for her to identify Appellant in the photo array, she testified, "Not long at all. It came back to me. I recognized it right off."

S.G. testified that the facial feature that she remembered the most was Appellant's nose. S.G. acknowledged that, before she viewed the array, she was informed that "[a] suspect's appearance might look different from how they looked on the date that they committed the offense." She testified that she recalled her attacker's nose was crooked, and she stated Appellant's nose was crooked in the photo.

After hearing Officer Bartels's and S.G.'s testimony, Appellant's counsel argued as follows with regard to why evidence of the photo array identification should not be admitted:

> My argument, basically, is that the photographs used in the photo array create a bias towards the defendant because of the age of the fillers and the age of Mr. Hawkins in the photograph that was used. This is a cold case that took place in 1996. At that time, Mr. Hawkins would have been 35 years old. The photograph in the array should have been of Mr. Hawkins close to the age of 35 and other men of similar features and of similar age. Instead, the complaining witness was shown a photo array of Mr. Hawkins at this current age of 56 with older men of similar age and showing the signs of—similar signs of aging that would not have been present in 1996 when this occurred.
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> And from what the complaining witness said, the most distinctive feature that she recognized happened to be a crooked nose, I don't know if any of the other men in the photographs have a similar feature. And she may have come to a different conclusion if she had been looking at younger men compared to younger photos of Mr. Hawkins.

In response, the State pointed out that, before viewing the photo array, S.G. was admonished "that the individuals may not appear exactly as they did at the

time of the incident." The State continued, asserting, "The other thing is that [the defense] complains that the photograph used of the defendant is at an older age. If anything, that benefits the defendant in that he doesn't look as similar as he did at the time of the date." The State pointed out that "every single one of these men [in the photo array] is approximately the same age, every single one of them has goatee type facial hair. If you look at the pictures, every single one of them have signs of age like forehead wrinkles, smile marks, everything."

The trial court denied Appellant's request to suppress evidence of the pretrial photo-array identification, stating "I have to agree with the State that the question before the Court at this hearing is whether or not the procedures used, including in the photographs, were unduly suggestive. I don't find anything about the photo spread or the procedures that the officer used that were impermissibly suggestive." The court continued, "Whether or not they should have or could have used a different photograph or whether her identification is accurate is a question for the jury, not for the Court."

The jury returned to the courtroom, and Officer Bartels testified about S.G.'s pretrial identification of Appellant from the photo array. The officer described the process she used to assemble the photo array, her presentation of the photo array to S.G., and S.G.'s identification of Appellant. The photo array had been earlier

admitted at the identification hearing. Appellant renewed his objection to admittance of the photo array, which the trial court denied.

S.G. also testified at trial about her selection of Appellant from the photo array as the man who had sexually assaulted her. In addition, without further objection from the defense, S.G. made an in-court identification of Appellant as her attacker. S.G. testified that she had gotten a good look at Appellant's face and at his nose. She indicated that Appellant's nose had been "the main thing in my face" during the sexual assault.

During his closing statement, Appellant touched on S.G.'s pretrial identification. He averred, "[S.G.] was either raped by an old man [as depicted in the photo lineup] or she was raped by Mr. Hawkins 20 years ago. Mr. Hawkins 20 years ago doesn't look like any of these men." He continued, "[S.G.] was either assaulted by somebody that was Mr. Hawkins' age, 35 [years old] at the time [the assault] happened, or an old man. That is the problem with this [photo] lineup[.]"

The jury found Appellant guilty of the offense of sexual assault of a child. Appellant chose to have the trial court assess his punishment.

Relevant to sentencing, the indictment contained two enhancement paragraphs. The first alleged that Appellant had been convicted of aggravated assault in 1986; the second paragraph alleged that Appellant had been convicted of robbery in June 1996. The defense objected to the second enhancement paragraph

because Appellant had been convicted of the robbery offense after the date of the sexual assault in this case. The State agreed that the robbery offense could not be used for enhancement purposes and abandoned the second enhancement allegation in the indictment.

Appellant, however, had been convicted of numerous other felonies, including a 1987 conviction for theft. The State had provided pretrial notice to Appellant informing him that it intended to introduce evidence at trial of his earlier convictions, including the 1987 theft offense. After it abandoned the second enhancement paragraph in the indictment, the State informed the trial court that it was substituting the 1987 theft conviction as a second enhancement allegation.

Appellant pleaded true to the first enhancement allegation in the indictment for aggravated assault. He did not expressly plead true to the substituted enhancement allegation for the 1987 theft; however, Appellant and his counsel signed a "Stipulation of Evidence," stipulating he was the person who had been convicted of six prior felonies identified in the document. These included the 1986 aggravated assault conviction and the 1987 theft conviction, which were the subject of the two sentencing enhancements. The trial court admitted the written stipulation into evidence.

At the end of the punishment phase, the trial court sentenced Appellant to life in prison. This appeal followed.

On appeal, Appellant raises two issues. He challenges the trial court's denial of his request to suppress evidence of S.G.'s pretrial identification of him in the photo array. Appellant also complains that the judgment of conviction indicates that he pleaded true to the second enhancement paragraph when he had not expressly pleaded true to the second enhancement allegation.

Pretrial Identification

In his first issue, Appellant asserts that the admission of evidence of S.G.'s pretrial identification violated his Fourteenth Amendment right to due process because the photo array shown to her was impermissibly suggestive. *See* U.S. CONST. amend. XIV. He also contends that the "suggestiveness of the pretrial photo lineup furthermore served to taint the subsequent in-court identification as well."[1]

A pretrial identification procedure may be so suggestive and conducive to mistaken identification that later use of that identification at trial would deny the accused due process of the law. *Conner v. State*, 67 S.W.3d 192, 200 (Tex. Crim. App. 2001); *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995). Whether the photo array was so impermissibly suggestive as to give rise to a very

[1] As the State points out, Appellant did not object to S.G.'s in-court identification of him. He objected only to her pretrial identification. "The failure to complain or object in the trial court to in-court identifications waives any complaint regarding the in-court identifications on appeal." *Mason v. State*, 416 S.W.3d 720, 738 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *see Perry v. State*, 703 S.W.2d 668, 670–71, 673 (Tex. Crim. App. 1986).

substantial likelihood of misidentification presents a mixed question of law and fact that does not turn on the evaluation of credibility and demeanor of the particular witnesses involved. *Burkett v. State*, 127 S.W.3d 83, 86 (Tex.App.—Houston [1st Dist.] 2003, no pet.). Thus, we review this question de novo. *See id.*

The United States Supreme Court has provided a two-step inquiry to address this issue: (1) whether the out-of-court identification procedure was impermissibly suggestive; and if so, (2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *See Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). The defendant has the burden to establish by clear and convincing evidence that the pretrial procedure was impermissibly suggestive. *See Balderas v. State*, 517 S.W.3d 756, 792 (Tex. Crim. App. 2016). "Suggestiveness may result from the manner in which a pre-trial identification procedure is conducted; the content of the line-up or photo array itself, as when the suspect is the only individual closely resembling the pre-procedure description; or the cumulative effect of the procedures and photographs used." *See Fisher v. State*, 525 S.W.3d 759, 762–63 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing *Barley*, 906 S.W.2d at 33).

In asserting on appeal that the pretrial procedure was impermissibly suggestive, Appellant does not dispute that the "filler" photos in the array depicted men similar in appearance to him as he appeared in his 2014 booking photo used in

the array. The evidence showed that Appellant was approximately 54 years old in 2014. Officer Bartels testified that she selected the filler photos from police department booking photos, selecting men between 40 and 50 years old. And she attempted to select men with similar physical features to Appellant. All of the men were African American, about the same age, with similar noses, each had some facial hair, and they had similar haircuts.[2]

Instead, Appellant asserts, as he did in the trial court, that the pretrial identification procedure was impermissibly suggestive because he and the other men in the photo array were older than Appellant was at the time of the sexual assault. Appellant points out that he and the other men in the photos appear to be in their fifties, but Appellant was 35 years old in 1996 when the offense occurred.

Impermissible suggestiveness occurs when the photographic identification procedure in some manner is so defective that it indicates or suggests the photograph the witness should identify. *Ward v. State*, 474 S.W.2d 471, 475 (Tex. Crim. App. 1971). Here, Appellant does not explain how using a photograph of

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[2] S.G. testified that "most of" the other men in the filler photos had straight noses, but Appellant's nose was crooked. However, Appellant does not assert on appeal that this made the photo lineup impermissibly suggestive. In any event, we note that it is not essential that all individuals in a photo lineup be identical in appearance. *Buxton v. State*, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985); *Colgin v. State*, 132 S.W.3d 526, 532 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd); *see also Williams v. State*, 675 S.W.2d 754, 757 (Tex. Crim. App. 1984) (holding that line up was not impermissibly suggestive even though appellant was only one of two men who appeared to match age given in witness's description and others appeared to be younger).

him when he was in his fifties drew attention to his photo when the other men in the array also appeared to be in their fifties. *See Page v. State*, 125 S.W.3d 640, 647 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that photographic array was not impermissibly suggestive because all men were African American, wore civilian clothes, had short black hair, and appeared of similar age).

Appellant intimates that his appearance would have been very different in 2014 from what it was in 1996. At the identification hearing, Officer Bartels agreed that Appellant "would probably have looked a lot different [in 2014] than in 1996"; however, the extent to which Appellant's appearance changed from 1996 to 2014 is not reflected in the record. No photo of Appellant from the time of the offense was introduced into evidence despite testimony indicating that there were booking photos of Appellant from the mid-1990s. Nor was there testimony describing how his appearance had changed. Before she viewed the array, S.G. was admonished that her assailant may have changed in his appearance since the time of the offense. And, as the State argued in the trial court, any change in Appellant's appearance may have worked to his advantage, increasing the likelihood that S.G. would not be able to identify him from the 2014 photo. *Cf. Newton v. State*, Nos. 05–07–01070–CR, 05–07–01071–CR, 05–07–01072–CR, 2008 WL 5221185, at *2 (Tex. App.—Dallas Dec.16, 2008, no pet.) (mem. op., not designated for publication) (rejecting appellant's argument that photo array

was suggestive because his hair was longer than other men's hair in array because his hair was only slightly longer than other's and because his hairstyle at time of offense differed from his and other men's hairstyle in shown the photo array).

Lastly, we note that "[a] pretrial lineup may be impermissibly suggestive if the suspect is the only individual in the array who closely resembles the pre-procedure description." *Balderas*, 517 S.W.3d at 793. Here, the record does not reflect how old S.G. believed her attacker to be at the time of the offense; no evidence was admitted showing that S.G. gave a pre-procedure description of her attacker.

On appeal, Appellant questions why Officer Bartels chose to use his 2014 booking photo rather than a booking photo from "closer in time to the date of the offense." But Officer Bartels addressed the reason for her choice in her testimony. She explained that she needed to ensure that all the photos in the array appeared similar to one another, and she indicated that there may have been issues with using an older booking photo. *Cf. Perkins v. State*, No. 03–00–00124–CR, 2001 WL 23132, at *4 (Tex. App.—Austin Jan. 11, 2001, no pet.) (mem. op., not designated for publication) (noting that witness was told that "the photographs could be new or old" when older booking photograph of defendant was used in array instead of Polaroid taken of defendant day of arrest because the Polaroid "would stand out" in the array). Appellant offered no evidence that the mid-1990s

booking photos were available to use in the array or that they would have been suitable.

Appellant also asserts that the pretrial identification procedure was impermissibly suggestive because Officer Bartels told S.G. before she viewed the array that there had been a DNA match in the case. He contends that, upon hearing this information, S.G. "felt compelled to make a positive identification." He points out that, when asked why she selected Appellant from the photo array, S.G. responded,

> Because I was careful to look—[Officer Bartels] told me to make sure I look at all of them carefully and not make a decision until I was sure. And that's why I know that [the photo array] was two pages. And I came back to that page and that's how I identified—I looked at them individually. I took my time. And I went back in my head to get that picture so that I wouldn't—so I would not be able to not identify this man.

Appellant asserts that the last sentence of S.G.'s statement shows that she felt "responsibility" "to provide the identification desired by law enforcement." However, Appellant did not present this argument to the trial court during the identification hearing. Appellant elicited testimony from S.G. and Officer Bartels indicating that Officer Bartels told S.G. that there had been a DNA match, but he never argued to the trial court that this rendered the pretrial identification unduly suggestive.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a)(1)(A); *Mosley v. State*, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) (op. on reh'g). "To make a specific objection, a party must 'let the trial judge know what he wants, why he thinks himself entitled to it, and . . . do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.'" *Shaw v. State*, 329 S.W.3d 645, 654 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). Because he did not present the knowledge-of-the-DNA-match argument to the trial court, Appellant has not preserved it for our review. *See* TEX .R. APP. P. 33.1(a)(1)(A); *see also Moore v. State*, No. 14–08–00146–CR, 2009 WL 1416075, *8 (Tex. App.—Houston [14th Dist.] May 21, 2009, pet. ref'd) (mem. op., not designated for publication) (holding that appellant had not preserved appellate argument that difference in facial structure among men in photos rendered array impermissibly suggestive because he did not make that argument in trial court; only argument made in trial court to support claim of undue suggestiveness was that appellant had different length of hair than other men; thus, that was only basis preserved for appeal); *Reynolds v. State*, No. 05–05–01601–CR, 2006 WL 3742898, at *1 (Tex.

App.—Dallas 2006, no pet.) (mem. op., not designated for publication) (holding argument that photo array was impermissibly suggestive because police officer conveyed that man whose prints matched those found in car was in array was not preserved for appeal when that argument not presented in trial court; only objections made in trial court were based on "similarities between two photos, the incident took place at night, and the degree of illumination was unclear"; "only objection presented to the trial court and now raised on appeal is the similarities of the two photos. Thus, this is the only argument properly presented to this Court for review").

The issue of preservation aside, we note that S.G.'s testimony cited by Appellant to support his impermissibly-suggestive argument—that is, S.G.'s testimony that "I went back in my head to get that picture so that I wouldn't—so I would not be able to not identify this man"—does not indicate that the identification procedure was suggestive. Instead, when read in context of her entire statement, S.G.'s testimony shows that she was careful and thoughtful in making her selection because she wanted to accurately identify her attacker.

We conclude that Appellant did not meet his burden of showing, by clear and convincing evidence, that the pretrial-identification procedure was

impermissibly suggestive.[3] *See Balderas*, 517 S.W.3d at 792. Thus, we hold that the trial court did not err when it denied Appellant's request to suppress evidence of the pretrial identification.

We overrule Appellant's first issue.

Plea of True to Second Enhancement Allegation

In his second issue, Appellant contends that the trial court's judgment contains error because it incorrectly reflects that he pleaded true to the second punishment–enhancement paragraph.

As discussed above, the State abandoned the second enhancement paragraph in the indictment because the conviction described in that paragraph occurred after the primary offense was committed. The State then informed Appellant and the trial court that it was substituting Appellant's 1987 theft conviction, which had been included in the State's Notice of Intention to Use Evidence of Prior Convictions and Extraneous Offenses, as a punishment-enhancement allegation. Although he expressly pleaded true to the first enhancement allegation in the indictment, Appellant did not enter a plea to the second substituted enhancement allegation. However, Appellant stipulated orally and in writing that he was the person convicted of the 1987 theft offense. In addition to the written stipulation,

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[3] Because we have concluded that the pretrial photo array was not impermissibly suggestive, we need not address whether the procedure created a substantial likelihood of misidentification. *See Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988).

the State offered into evidence Appellant's "pen packet," which included the judgment of conviction for the 1987 theft conviction.

At the close of the punishment evidence, the trial court found "that the enhancement paragraphs are true" and sentenced Appellant to life in prison. The judgment reflects that the trial court found both enhancement allegations "true." It also reflects that Appellant pleaded "true" to the first and second enhancement paragraphs.

"A plea of 'true' will satisfy the State's burden of proving an enhancement allegation, but there must be affirmative evidence in the record showing that the defendant entered a plea of 'true.'" *Wood v. State*, 486 S.W.3d 583, 587–88 (Tex. Crim. App. 2016) (citing *Wilson v. State*, 671 S.W.2d 524, 524 (Tex. Crim. App. 1984)). "If there is no affirmative evidence in the record showing a plea of 'true' to the enhancement, we require the State to prove the allegation beyond a reasonable doubt." *Id.* at 588. More precisely, to establish a defendant's conviction of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior final conviction exists, and (2) the defendant is linked to that conviction. *Id.* (citing *Flowers v. State*, 220 S.W.3d 919, 921–22 (Tex. Crim. App. 2007)). To meet its burden, "the State may introduce documents, admissions or stipulations, or testimonial evidence sufficient to prove that the defendant was convicted of the enhancement allegation." *Id.*

With regard to the first enhancement allegation, the record affirmatively reflects that Appellant formally entered an express plea of true. However, in contrast, neither Appellant nor his attorney formally expressed a plea of true or guilty to the 1987 theft offense, constituting the second enhancement allegation. *See Henry v. State*, 331 S.W.3d 552, 555 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (determining that record contained no evidence of a plea to enhancement allegations, even though defendant stipulated to prior felony convictions alleged in indictment); *cf. Tindel v. State*, 830 S.W.2d 135, 137 (Tex. Crim. App. 1992) (holding that record was sufficient to show that defendant pleaded true to enhancement allegation because defense counsel had stated "guilty" when trial court asked how defendant pled to enhancement paragraph). Instead, the State met its burden of linking Appellant to the theft conviction and establishing the conviction's existence by introducing the signed stipulation and the theft judgment into evidence. We agree with Appellant that the record does not affirmatively show that he pleaded true to the second enhancement allegation. Thus, the statement in the judgment of conviction, indicating that Appellant pleaded true to the second enhancement paragraph, is incorrect.

As noted by the State, we have the authority to modify the judgment to comport with the record and to reflect that Appellant did not plead true to the second enhancement allegation. *See French v. State*, 830 S.W.2d 607, 609 (Tex.

Crim. App. 1992) (holding that appellate court could reform judgment to reflect jury's affirmative deadly weapon finding); *see also* TEX. R. APP. P. 43.2(b) (providing that court of appeals may modify trial court's judgment and affirm as modified); *Guyton v. State*, No. 04–13–00179–CR, 2014 WL 2917213, at *3 (Tex. App.—San Antonio June 25, 2014, no pet.) (mem. op., not designated for publication) (modifying trial court's judgment to reflect that appellant had pleaded "not true" rather than "true"). Therefore, because the record does not affirmatively reflect that Appellant pleaded true to the second enhancement allegation, we modify the judgment to reflect that Appellant pleaded "not true" to the second enhancement paragraph.

We sustain Appellant's second issue.

Conclusion

We affirm the judgment of the trial court as modified.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Higley and Bland.

Do not publish. TEX. R. APP. P. 47.2(b).