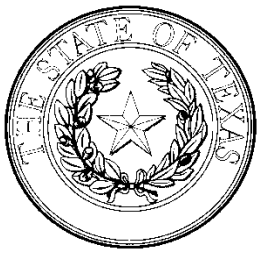
Opinion issued August 4, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00100-CR

EX PARTE MAURICE EDWARDS, Appellant

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1620108

OPINION ON REHEARING

Appellee, the State of Texas, has filed a motion for en banc reconsideration of our August 27, 2019 opinion and judgment.[1] Treating the motion for en banc reconsideration as a request for a panel rehearing,[2] we deny the motion for rehearing, withdraw our opinion and judgment of August 27, 2019, and issue this

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1 *See* TEX. R. APP. P. 49.7.

2 *See id.* 49.1.

opinion and new judgment in their stead.[3] We dismiss the State's motion for en banc reconsideration as moot.[4]

Appellant, Maurice Edwards, challenges the trial court's order denying his pretrial application for a writ of habeas corpus. In his sole issue, appellant contends that the trial court erred in denying his requested habeas relief because the ten-year statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault.[5]

We reverse and remand.

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3 *See Wooters v. Unitech Int'l, Inc.*, 513 S.W.3d 754, 757 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (treating motion for en banc reconsideration as request for panel rehearing, vacating original opinion and judgment, issuing new opinion and judgment in their stead, and dismissing motion for en banc reconsideration as moot); *see also Butler v. State*, 6 S.W.3d 636, 637 & n.1 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

4 *See Buxton v. State*, 526 S.W.3d 666, 671, 692 n.9 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Wooters*, 513 S.W.3d at 757; *see also Giesberg v. State*, 945 S.W.2d 120, 131 n.3 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 984 S.W.2d 245 (Tex. Crim. App. 1998).

5 *See* TEX. PENAL CODE ANN. § 22.021(a), (e) ("Aggravated Sexual Assault"); *see also* TEX. CODE CRIM. PROC. ANN. arts. 12.01(2)(E), 12.03(d); *Ex parte Tamez*, 38 S.W.3d 159, 160 (Tex. Crim. App. 2001) (application for writ of habeas corpus proper vehicle to invoke statute of limitations "if the pleading, on its face, shows that the offense charged is barred by limitations"); *Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088, at *3 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref'd) (mem. op., not designated for publication) (offense of aggravated sexual assault "carries the same limitations period as sexual assault").

Background

On November 16, 2017, a Harris County Grand Jury issued a true bill of indictment, alleging that on or about May 2, 2003, appellant committed the felony offense of aggravated sexual assault.[6] Appellant filed a verified pretrial application for a writ of habeas corpus, asserting that he had been "confined and restrained of liberty by the [s]heriff of Harris County, Texas in the Harris County Jail" and his confinement and restraint were illegal because the applicable statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault in violation of the Sixth Amendment to the United States Constitution, Article I section 10 of the Texas Constitution, and Article 12.01 of the Texas Code of Criminal Procedure.[7] Appellant sought "dismissal of the charge [against him as] being outside the statute of limitations."[8]

The trial court held a hearing on appellant's application. Appellant offered, and the trial court admitted into evidence without objection, a copy of the complaint, the indictment, Texas Code of Criminal Procedure Article 12.01, and a Houston Police Department ("HPD") offense report. The parties "stipulate[d] to the facts that [were] in the offense report" for the purposes of the hearing.

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6 *See* TEX. PENAL CODE ANN. § 22.021(a), (e) ("Aggravated Sexual Assault").

7 *See* U.S. CONST. amend VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 12.01.

8 *See Ex parte Tamez*, 38 S.W.3d at 160.

In the report, HPD Officer B.K. Foley stated that, on May 2, 2003, he was "dispatched to a sexual assault [that had] just occurred," and upon his arrival, "the complainant was at the scene" and the perpetrator was not present. He spoke with the complainant, who said that the alleged perpetrator's name was "Maurice" and she "d[id] not know his last name or phone number off hand," had met him when she worked at the Moments Cabaret strip club, and had "gone out with [him] a few times." On the day of the sexual assault, she "called [Maurice] to come and pick her up from a friend[']s house" and he was "going to eventually give her a ride to [a convenience store] where her boyfriend was supposed to be waiting." However, Maurice drove past the store and into an apartment complex, where the complainant "tried to get out of the vehicle" as Maurice began "grabbing her and hitting her." When the complainant tried to get away, Maurice started to choke her. Maurice then "took her clothes [off] and had sex with her."

Emergency assistance personnel transported the complainant to a hospital "to have a rape kit done." Officer Foley "ran the license plate [number] of [Maurice's] vehicle," which two witnesses at the scene had given to him. The information he received from "r[unning] the license plate [number]" indicated that "there was a city warrant on the vehicle for a Maurice Edwards[, date of birth] 11-13-77," along with a Texas driver's license number. Foley then "ran the criminal history on [Maurice Edwards] and the info[rmation] matched" the information that the

complainant had provided. In his report, Foley identified "one possible suspect" as "Edwards, Maurice Ellis." Foley also noted that the complainant was "very hysterical and hard to interview," "often did not answer questions and appeared to not be telling the whole truth about her relationship with [Maurice] and how they met both originally and [on the day of the sexual assault]," and "often tried to change the subject and appeared to be withholding information."

On May 6, 2003, HPD Officer L.D. Garretson, who had been assigned to the investigation, supplemented the offense report, stating that there had not been a supplement to the offense report made "regarding the recovery/tagging of the complainant's sexual assault kit into the HPD property room." Garretson listed "Maurice Ellis Edwards" as the "suspect" who sexually assaulted the complainant. On May 15, 2003, HPD Officer M.T. Walding supplemented the offense report, stating that he had stopped a car that matched the description of Maurice's car, the driver was "identified as Tommie C. []Lewis," and "[t]he passenger claimed he was Jason Lewis." When Walding asked Tommie "when he last saw Maurice," Tommie answered, "about a year ago." Walding called the complainant, who stated that "this was obvious[ly] a lie," and she advised Walding that neither of the men fit the description of Maurice.

On May 16, 2003, Officer Garretson reviewed "[the] complainant's sexual assault examination forensic report forms for [submission] to the HPD crime lab for

DNA analysis and comparison purposes." In his supplement to the offense report, he noted that the complainant had not attempted to contact him and had not responded to the "Sex Crimes Unit Contact Letter" that he had sent to her on May 6, 2003. According to Garretson, "[u]ntil . . . contact" from the complainant was received, the status of the investigation was "case cleared due to lack of prosecution by [the] complainant." Garretson against listed "Maurice Ellis Edwards" as the "suspect."

A November 7, 2013 supplement to the offense report by Officer Limscop reflects that laboratory testing "in association with a request for outsourced – DNA analysis" was completed. And a February 5, 2014 supplement to the offense report by Office Limscop shows that a laboratory analysis "in association with a request for CODIS[9] analysis" was completed.

On April 13, 2014, HPD Officer J.H. Lewis supplemented the offense report, stating that on March 13, 2014, he had received the case "for further investigation regarding a CODIS match confirmation." On August 22, 2017, HPD Officer N. Vo

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9 "CODIS" stands for "Combined DNA Index System." *Segundo v. State*, 270 S.W.3d 79, 83 n.3 (Tex. Crim. App. 2008); *see also* TEX. GOV'T CODE ANN. § 411.141(1) ("'CODIS' means the FBI's Combined DNA Index System" and "includes the national DNA index system sponsored by the FBI"); *Williams v. State*, No. 09-14-00463-CR, 2017 WL 1455962, at *1 n.1 (Tex. App.—Beaumont Apr. 19, 2017, no pet.) (mem. op., not designated for publication) (describing CODIS as "the combined DNA electronic database system that houses DNA profiles from different sources").

updated the offense report, stating that he had interviewed the complainant, who "positively identified [Maurice] through [a] photo[graphic] array even though the [sexual assault] happened 13 years ago." He further stated that the Harris County District Attorney's Office had "advised [him] that charges for aggravated sexual assault were accepted" and a search warrant for buccal swabs from Maurice, who was "currently in jail for another charge," would be obtained.

On September 20, 2017, Officer Vo obtained two buccal swabs from appellant and submitted them for DNA analysis and comparison "to the male DNA that was found in the complainant's sexual assault kit." In Vo's November 1, 2017 supplement to the offense report, he noted that the laboratory results from the buccal swabs were still pending. "However, the case ha[d] been thoroughly investigated" and "charges [had been] filed."

No other evidence was offered or admitted at the hearing, and no witnesses testified. In response to appellant's habeas application, the State argued that, under Texas Code of Criminal Procedure Article 12.01(1)(C)(i), no statute of limitations applied to the felony offense of aggravated sexual assault allegedly committed by appellant because biological matter was collected during the investigation, the matter was subjected to forensic DNA testing, and the testing results showed that the biological matter "d[id] not match the victim or any other person whose identity

[was] readily ascertained."[10] According to the State, all "three prongs . . . set out under [Article] 12.01(1)(C)(i) ha[d] been met," there were "no issues with the statute of limitations with [appellant's] case," and appellant's requested habeas relief "should be denied."

While presenting its argument at the hearing, the State also focused on "the proper definition of 'readily ascertained'" and whether appellant was "absolutely ascertainable" but was not "readily ascertained," as Article 12.01(1)(C)(i) required for no statute of limitations to apply.[11] The State asserted that it "did not have the link to [appellant] based on his DNA until 2014," and "[w]ithout a DNA profile being obtained from the testing of the [sexual assault] kit, a suspect, under the law, has not been readily ascertained." In other words, appellant was not "readily ascertained to a point where the State believed that it had gathered enough evidence sufficient to prove [its] case beyond a reasonable doubt until the CODIS hit and the subsequent identification of [appellant] out of [the photographic array] by the complainant, which did not occur until 2017."

In contrast, appellant, at the hearing, reiterated that his "core position" was that "the ten-year statute of limitations d[id] apply"[12] to his case, he was

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10 *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i).

11 *See id.*

12 *See id.* arts. 12.01(2)(E), 12.03(d).

"not . . . indicted until 2017," although the alleged sexual assault took place in 2003, the prosecution of appellant for the felony offense of aggravated sexual assault was "time-barred," and he was entitled to habeas relief. As to Texas Code of Criminal Procedure Article 12.01(1)(C)(i), appellant directed the trial court to two cases that addressed whether Texas Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception eliminates the general ten-year statute of limitations applicable to the felony offense of aggravated sexual assault. Appellant also responded to the State's argument regarding whether appellant constituted a "person whose identity [was] readily ascertained."[13]

At the conclusion of the hearing, the trial court denied appellant's requested habeas relief.

Standard of Review

A pretrial writ of habeas corpus is an extraordinary remedy. *Ex parte Ingram*, 533 S.W.3d 887, 891 (Tex. Crim. App. 2017); *see also Ex parte Arango*, 518 S.W.3d 916, 923 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (proper use of pretrial habeas relief is where "conservation of judicial resources would be better served by interlocutory review" (internal quotations and citation omitted)). A defendant may use a pretrial writ in very limited circumstances, including to challenge a court's jurisdiction if the face of the indictment shows that the statute of limitations bars a

13 *See id.* art. 12.01(1)(C)(i).

prosecution. *Ex parte Smith*, 178 S.W.3d 797, 802 (Tex. Crim. App. 2005); *Ex parte Tamez*, 38 S.W.3d 159, 160 (Tex. Crim. App. 2001). Limitations is an absolute bar to prosecution. *See Ex parte Smith*, 178 S.W.3d at 802.

The applicant for a writ of habeas corpus has the burden to establish his entitlement to relief by preponderance of the evidence. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). We review the trial court's ruling on a pretrial application for a writ of habeas corpus for an abuse of discretion. *See id.*; *Ex parte Arango*, 518 S.W.3d at 923–24; *Washington v. State*, 326 S.W.3d 701, 704 (Tex. App.—Houston [1st Dist.] 2010, no pet.). In doing so, we view the facts in the light most favorable to the trial court's ruling and defer to the trial court's implied factual findings that are supported by the record. *See Kniatt*, 206 S.W.3d at 664; *Washington*, 326 S.W.3d at 704. When the resolution of the ultimate issue turns on an application of purely legal standards, our review is de novo. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999); *Ex parte Leachman*, 554 S.W.3d 730, 737 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd).

Limitations

In his sole issue, appellant argues that the trial court erred in denying him habeas relief because the applicable ten-year statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault and Texas Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception to the general

ten-year statute of limitations did not apply. *See* TEX. CODE CRIM. PROC. ANN. arts. 12.01(1)(C)(i), (2)(E), 12.03(d); *see also Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088, at *3 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref'd) (mem. op., not designated for publication) (offense of aggravated sexual assault "carries the same limitations period as sexual assault").

A statute of limitations protects one accused of an offense "from having to defend [himself] against [a] charge[] when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Hernandez v. State*, 127 S.W.3d 768, 772 (Tex. Crim. App. 2004) (internal quotations omitted); *see also Ibarra v. State*, 11 S.W.3d 189, 193 (Tex. Crim. App. 1999) ("The applicable statute of limitations is the primary assurance against bringing an unduly stale criminal charge."); *State v. Schunior*, 467 S.W.3d 79, 81 (Tex. App.—San Antonio 2015), *aff'd*, 506 S.W.3d 29 (Tex. Crim. App. 2016). As the Texas Court of Criminal Appeals has observed, if a defendant receives adequate notice of a charge, he can preserve those facts that are essential to his defense. *See Hernandez*, 127 S.W.3d at 772. A statute of limitations is construed strictly against the State and liberally in favor of the defendant. *See Ex parte Lovings*, 480 S.W.3d 106, 111 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Schunior*, 467 S.W.3d at 81.

Generally, the statute of limitations for the felony offense of aggravated sexual assault of an adult[14] is ten years from the date of the commission of the offense. *See* TEX. CODE CRIM. PROC. ANN. arts. 12.01(2)(E), 12.03(d); *see also Ex parte Goodbread*, 967 S.W.2d 859, 865 (Tex. Crim. App. 1998) (Baird, J., concurring); *Ex parte Montgomery*, 2017 WL 3271088, at *3 (offense of aggravated sexual assault "carries the same limitations period as sexual assault"); *In re Joyner*, No. 01-17-00053-CR, 2017 WL 1326099, at *1 (Tex. App.—Houston [1st Dist.] Apr. 11, 2017, orig. proceeding) (mem. op., not designated for publication). But there is no statute of limitations for the felony offense of aggravated sexual assault if it is established that during the investigation of the offense biological matter was collected and subjected to forensic DNA testing and the testing results show that the matter did not match the victim or any other person whose identity was readily ascertained. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte Montgomery*, 2017 WL 3271088, at *1–4 (limitations period for sexual assault and aggravated sexual assault eliminated if Article 12.01(1)(C)(i) requirements are satisfied); *Martinez v. State*, No. 03-12-00273-CR, 2014 WL 1208774, at *2 (Tex. App.—Austin Mar. 20, 2014, no pet.) (mem. op., not designated for publication); *cf. Dallas Cty. Dist. Attorney's Office v. Hoogerwerf*, No. 2-05-034-CV, 2005 WL 3436557, at *2 (Tex. App.—Fort Worth Dec. 15, 2005, no pet.) (mem. op., not

[14] *See* TEX. PENAL CODE ANN. § 22.021(a) ("Aggravated Sexual Assault").

designated for publication) (explaining statute of limitations for offense of sexual assault, "where the identity of the assailant is readily ascertained," is ten years from commission of offense).

Texas Code of Criminal Procedure Article 12.01(1)(C)(i) does not impose "a duty on the State to look for a match" or a temporal limit on the State's investigation. *See Ex parte Lovings*, 480 S.W.3d at 111–12. Nevertheless, for Article 12.01(1)(C)(i)'s exception to the general ten-year statute of limitations to apply, each of the three prongs set forth in Article 12.01(1)(C)(i) must be met. *See Ex parte S.B.M.*, 467 S.W.3d 715, 719 (Tex. App.—Fort Worth 2015, no pet.). Thus, it must be established that: (1) during the investigation of a sexual assault, biological matter was collected, (2) the biological matter was subjected to forensic DNA testing, and (3) the forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719.

Here, appellant does not dispute that biological matter was collected and subjected to forensic DNA testing. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719. Rather, he asserts that there is no evidence of forensic DNA testing results showing that the biological matter collected did not match the victim or any other person whose identity was readily

ascertained, as Article 12.01(1)(C)(i) requires. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719.

A. Preservation

As an initial matter, the State asserts that appellant did not preserve his argument that "the State never provided the trial court with the type of statutorily required evidence [of forensic DNA testing results] that is necessary to trigger [Texas Code of Criminal Procedure] Article 12.01(1)(C)[(i)'s] exception to the ten-year . . . statute of limitations," and as such, appellant is not entitled to habeas relief.[15]

Preservation of error is generally a prerequisite for being granted habeas relief. *See Garza v. State*, 435 S.W.3d 258, 261–62 (Tex. Crim. App. 2014); *see, e.g.*, *Ex parte Nelson*, No. 01-19-00325-CR, 2019 WL 6315197, at *3 (Tex. App.—Houston [1st Dist.] Nov. 26, 2019, pet. ref'd) (mem. op., not designated for publication); *Ex parte Palacios*, No. 08-16-00220-CR, 2018 WL 8807230, at *1–2 (Tex. App.—El Paso July 24, 2018, no pet.) (not designated for publication) (affirming trial court's denial of relief requested in appellant's pretrial application for writ of habeas corpus and holding defendant did not preserve error "as to one of [her] constitutional challenges brought for the first time on appeal"). To preserve

[15] *See Bekendam v. State*, 441 S.W.3d 295, 299–301 (Tex. Crim. App. 2014) (addressing State's preservation argument).

error, Texas Rule of Appellate Procedure 33.1(a) requires a complaining party to make an objection or complaint to the trial court with "sufficient specificity[,] . . . unless the specific grounds were apparent from the context." TEX. R. APP. P. 33.1(a). Essentially, the complaining party must inform the trial court as to what he wants and why he thinks he is entitled to it, and to do so clearly enough for the trial court to understand him at a time when it is in a proper position to do something about it. *See Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014); *Keeter v. State*, 175 S.W.3d 756, 760 (Tex. Crim. App. 2005); *see also Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002) (appellate court reviews trial court's ruling in light of what was before trial court at time ruling made).

However, in determining whether a party has preserved his complaint for appellate review, an appellate court must avoid splitting hairs. *Keeter*, 175 S.W.3d at 760; *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (appellate courts "should reach the merits of th[e] complaints without requiring that the parties read some special script to make their wishes known"). We are not hyper-technical in our examination of whether error was preserved, and we must consider the context when determining whether a party has preserved a complaint. *See Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014); *Keeter*, 175 S.W.3d at 760; *see also Leal v. State*, 469 S.W.3d 647, 649 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("Error preservation does not involve a hyper-technical

or formalistic use of words or phrases; rather, straightforward communication in plain English is sufficient. . . . We consider the context in which the complaint was made and the parties' shared understanding at the time.").

In his pretrial application for a writ of habeas corpus, appellant asserted that "[h]e [had been] charged with [the felony offense of] [a]ggravated [s]exual [a]ssault alleged to have been committed in May, 2003" and he had been "confined and restrained of liberty by the [s]heriff of Harris County, Texas in the Harris County Jail." According to appellant, his confinement and restraint were illegal because the applicable statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault *in violation of* the Sixth Amendment to the United States Constitution, Article I, section 10 of the Texas Constitution, and *Article 12.01 of the Texas Code of Criminal Procedure*. (Emphasis added.) *See* U.S. CONST. amend VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 12.01. Appellant sought "dismissal of the [aggravated sexual assault] charge [against him as] being outside the statute of limitations." *See Ex parte Powell*, 570 S.W.3d 417, 420 (Tex. App.—Waco 2019, no pet.) (in determining whether defendant preserved his constitutional challenges asserted on appeal, considering whether defendant raised such complaints in his pretrial application for a writ of habeas corpus or before trial court at hearing); *Ex parte Perez*, 536 S.W.3d 877, 880–81 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *see also Ex parte Letizia*,

No. 01-16-00808-CR, 2019 WL 610719, at *4 (Tex. App.—Houston [1st Dist.] Feb. 14, 2019, pet. ref'd) (mem. op., not designated for publication).

At the hearing on appellant's habeas application, the State responded to appellant's request for habeas relief by asserting that, pursuant to Texas Code of Criminal Procedure Article 12.01(1)(C)(i), "no statute of limitations" applied to the felony offense of aggravated sexual assault allegedly committed by appellant. According to the State, under Article 12.01(1)(C)(i), "if there's biological matter collected during the investigation that is subjected to forensic DNA testing and . . . the testing results show [that] the biological matter does not match the victim or any person whose identity is readily ascertained," then there is "no limitations." And the State asserted that in appellant's case, "the three prongs . . . set out under [Article] 12.01(1)(C)(i) ha[d] been met," there were "no issues with the statute of limitations with [appellant's] case," and appellant's requested habeas relief "should be denied." *Cf. Ex parte Lovings*, 480 S.W.3d at 108–12 (addressing merits of appellate issue of whether Article 12.01(1)(C)(i) applied, where defendant filed pretrial application for writ of habeas corpus, arguing ten-year statute of limitations applied to felony offense of sexual assault, State responded defendant's case was "governed by the [statute-of-limitations] exception established" by Article 12.01(1)(C)(i), and trial court denied defendant's requested habeas relief); *see also Ex parte S.B.M.*, 467 S.W.3d at 716–20 (addressing merits

of appellate issue of whether trial court erred in determining Article 12.01(1)(C)(i)'s exception to statute of limitations applied, where appellant filed petition for expunction, arguing he was entitled to expunction related to his 2003 arrest for offense of sexual assault because "he had never been charged with the offense and . . . his prosecution for it was no longer possible because the ten-year statute of limitations period had expired," and State responded prosecution was "still possible because th[e] [offense of] sexual assault fell within [A]rticle 12.01(1)(C)[(i)]'s exception to the general ten-year sexual assault statute of limitations").

In response to the State's argument at the hearing, appellant reiterated that his "core position" was that "the ten-year statute of limitations d[id] apply" to his case, he was "not . . . indicted until 2017," although the alleged offense took place in 2003, the prosecution of appellant for the felony offense of aggravated sexual assault was "time-barred," and he was entitled to habeas relief. During his argument, appellant referenced *Ex parte Montgomery* and *Ex parte Lovings*—two cases which address whether Texas Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception eliminates the ten-year statute of limitations generally applicable to the felony offense of aggravated sexual assault. *See Ex parte Montgomery*, 2017 WL 3271088, at *1–4; *Ex parte Lovings*, 480 S.W.3d at 108–09.

Notably, the trial court's comments during the hearing indicate that it understood that the focus of the disagreement between the State and appellant over the applicability of Article 12.01(1)(C)(i)'s exception was centered on the third prong of the statutory provision—whether the forensic DNA testing results showed that the biological matter collected did not match the victim or any other person whose identity was readily ascertained. *See Chase*, 448 S.W.3d at 11 (error preserved where record showed trial court understood defendant's request to include matters about which he complained on appeal); *Zavala v. State*, No. 05-16-00227-CR, 2017 WL 2180700, at *4 (Tex. App.—Dallas May 18, 2017, no pet.) (mem. op., not designated for publication) (to determine preservation, appellate court "look[s] for statements or actions on the record that clearly indicate the trial court's . . . understanding").

While the parties and the trial court did spend a fair amount of time at the hearing discussing whether appellant, under Article 12.01(1)(C)(i)'s third prong, constituted a "person whose identity [was] readily ascertained," this was partly because the trial court allowed the State to present its responsive argument first at the hearing and the State chose to focus on the "readily ascertained" portion of Article 12.01(1)(C)(i)'s third prong. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i) (no statute of limitations for felony offense of aggravated sexual assault if "during the investigation of the offense biological matter is collected and

subjected to forensic DNA testing and *the testing results show that the matter does not match* the victim or *any other person whose identity is readily ascertained*" (emphasis added)). The trial court then asked appellant for his response to that portion of the State's argument.

Still yet, even if the parties' arguments at the hearing may have been more focused around the meaning of "readily ascertained" and whether appellant's "identity [was] readily ascertained," this is not dispositive of our preservation-of-error analysis. *See Eisenhauer v. State*, 754 S.W.2d 159, 160–61 (Tex. Crim. App. 1988), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. App. 1991); *Cisneros v. State*, 290 S.W.3d 457, 462–63 (Tex. App.—Houston [14th Dist.] 2009) (although parties' arguments at hearing focused on one ground raised by defendant, to preserve error movant need not discuss at hearing all grounds raised in motion), *pet. dism'd, improvidently granted*, 353 S.W.3d 871 (Tex. Crim. App. 2011). Here, the trial court made clear at the hearing that it understood that "the general statute of limitations in 2003 for [aggravated] sexual assault was ten years" and it was tasked with determining whether, pursuant to Article 12.01(1)(C)(i), "certain conditions [had been] met" that would "hold[] the statute of limitations." *See Chase*, 448 S.W.3d at 11 (error preserved where record showed trial court understood defendant's request to include matters about which he complained on appeal); *Keeter*, 175 S.W.3d at 760

(must consider context when determining whether party preserved complaint); *see also Leal*, 469 S.W.3d at 649. Further, that appellant may have refined his argument on appeal or expressed it more clearly and succinctly does not mean that he has not preserved it for appellate review. *See Sullivan v. Abraham*, 488 S.W.3d 294, 297 (Tex. 2016).

Based on the foregoing, and considering both appellant's pretrial application for a writ of habeas corpus and the hearing on appellant's application, we hold that appellant preserved his argument that Texas Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception to the general ten-year statute of limitations did not apply to his case because there was no evidence of forensic DNA testing results showing that the biological matter collected did not match the victim or any other person whose identity was readily ascertained, as Article 12.01(1)(C)(i) requires. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719.

B. Applicability of Article 12.01(1)(C)(i)

As previously noted, there is no statute of limitations for the felony offense of aggravated sexual assault if it is established that: (1) during the investigation of a sexual assault, biological matter was collected, (2) the biological matter was subjected to forensic DNA testing, and (3) the forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *see also*

Ex parte Montgomery, 2017 WL 3271088, at *1–4 (limitations period for sexual assault and aggravated sexual assault eliminated if Article 12.01(1)(C)(i) requirements are satisfied); *Ex parte S.B.M.*, 467 S.W.3d at 719; *Martinez*, 2014 WL 1208774, at *2.

Appellant does not dispute that the first and second prongs of Texas Code of Criminal Procedure Article 12.01(1)(C)(i) are met. Instead, our focus is on the third prong—whether the forensic DNA testing results showed that the biological matter collected did not match the victim or any other person whose identity was readily ascertained. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719. Appellant asserts that the evidence presented at the hearing on his habeas application *did not include forensic DNA testing results showing* that the biological matter collected did not match the victim or any other person whose identity was readily ascertained, which is necessary to trigger Article 12.01(1)(C)'s exception to the generally applicable ten-year statute of limitations. For instance, according to appellant, the record does not contain any "CODIS type evidence" or a "Crime Lab [a]nalysis report." The State responds that "the forensic DNA testing results show[ed] that the biological material collected did not match the victim or any other person whose identity [was] readily ascertained, in this case [appellant]." (Emphasis omitted.)

At the hearing on appellant's habeas application, the parties stipulated to the facts contained in the HPD offense report that the trial court admitted into evidence without objection. That offense report showed that emergency assistance personnel transported the complainant to a hospital "to have a rape kit done," a "rape/sexual assault kit" was submitted for forensic testing, and laboratory testing was completed "in association with a request for outsourced – DNA analysis" and "a request for CODIS analysis." In April 2014, Officer Lewis received the case "for further investigation regarding a CODIS match confirmation." In 2017, Officer Vo interviewed the complainant, who identified appellant in a photographic array. Vo also obtained two buccal swabs from appellant and requested a DNA analysis of the buccal swabs and a comparison of "the DNA to the male DNA that was found in the complainant's sexual assault kit."

To eliminate the statute of limitations for the felony offense of aggravated sexual assault, Texas Code of Criminal Procedure Article 12.01(1)(C)(i) requires "testing results" from forensic DNA testing performed on the collected biological matter. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 716–20; *see also* TEX. GOV'T CODE ANN. § 411.141(7) (defining, for purposes of state DNA database, "DNA record" as "results of a forensic DNA analysis performed by a DNA laboratory," including "a DNA profile and related records"). This is because in order for Article 12.01(1)(C)(i) to apply, the "testing

results" must "show" that the tested biological matter did not match the victim or any person whose identity was readily ascertained. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 716–20.

Evidence showing the assignment of the case "for further investigation regarding a CODIS match confirmation" and a request to analyze appellant's buccal swabs for comparison "to the male DNA that was found in the complainant's sexual assault kit" does not constitute evidence of forensic DNA testing results to show that the biological matter collected in the complainant's "sexual assault kit" did not match a person whose identity was not readily ascertained. In fact, any laboratory results from the buccal swabs were still pending at the time of the hearing. *See Ex parte S.B.M.*, 467 S.W.3d at 716–20 (examining evidence admitted at hearing and concluding Article 12.01(1)(C)(i)'s exception did not apply when biological matter was collected and tested but testing results were not attainable); *cf. Ex parte Lovings*, 480 S.W.3d at 108 (evidence presented showed DNA analysis identified DNA of complainant and male donor, and CODIS provided "'hit' between appellant's DNA and the DNA of the male donor"). Because the record does not establish that: (1) during the investigation of a sexual assault, biological matter was collected, (2) the biological matter was subjected to forensic DNA testing, *and* (3) *the forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained*, we conclude that Texas

Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception to the general ten-year statute of limitations does not apply to appellant's case.[16] *See* TEX. CODE CRIM. PROC. ANN. arts. 12.01(1)(C)(i), (2)(E), 12.03(d); *see also Ex parte Montgomery*, 2017 WL 3271088, at *1–4 (limitations period for sexual assault and aggravated sexual assault eliminated if Article 12.01(1)(C)(i) requirements are satisfied); *Ex parte S.B.M.*, 467 S.W.3d at 716–20; *Martinez*, 2014 WL 1208774, at *2.

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[16] As previously noted, the record in this case shows that during the hearing on appellant's habeas application, the parties and the trial court discussed whether appellant, under Article 12.01(1)(C)(i)'s third prong, constituted a "person whose identity [was] *readily ascertained*" or "*readily ascertainable* at the time." (Emphasis added.) *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i). To clarify, Article 12.01(1)(C)(i) requires forensic DNA testing results that "show that the matter does not match the victim or any other person whose identity is readily ascertained," *not* "readily ascertainable." *See id.*; *Ex parte Lovings*, 480 S.W.3d 106, 112 (Tex. App.—Houston [14th Dist.] 2015, no pet.). However, in this case, we need not address whether and when appellant's identity was "readily ascertained" because there is no statutorily required evidence of forensic DNA testing results. *See* TEX. R. APP. P. 47.1.

That being said, Officer Foley stated in the offense report that the complainant provided appellant's first name—"Maurice"—at the scene. The complainant later provided a description of "Maurice" to Officer Walding, who had contacted her by telephone. Further, witnesses at the scene provided the license plate number for appellant's car and when Foley "ran the license plate [number]," the information he received indicated that "there was a city warrant on the vehicle for a Maurice Edwards[, date of birth] 11-13-77," along with a Texas driver's license number. The offense report also shows that Foley "ran the criminal history on [Maurice Edwards] and the info[rmation] matched" the information that the complainant had provided. From this, Foley ascertained "one possible suspect" as "Edwards, Maurice Ellis." Officer Garretson's supplements to the offense report from four days after the sexual assault and fourteen days after the sexual assault list "Maurice Ellis Edwards" as the "suspect" who sexually assaulted the complainant.

Accordingly, we hold that the trial court erred in denying appellant's requested habeas relief.

We sustain appellant's sole issue.[17]

Conclusion

We reverse the trial court's order denying appellant's requested habeas relief and remand this matter to the trial court with instructions to enter an order granting appellant the habeas relief requested in his pretrial application for a writ of habeas corpus. *See* TEX. R. APP. P. 31.3.

Julie Countiss
Justice

Panel consists of Justices Lloyd, Landau, and Countiss.

Publish. TEX. R. APP. P. 47.2(b).

[17] The State argues that appellant's "prayer for relief and discharge is ineffectual" because, even if appellant is correct, the appropriate remedy is "to reverse and remand for a new hearing, at which time the State would offer the [DNA] testing results, thereby remedying the complained-of error." The State, however, does not present any argument or authority in support of remanding the case to the trial court for a new hearing on appellant's application for habeas relief.