Opinion issued November 9, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00438-CR

VITH LOCH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1463146

MEMORANDUM OPINION ON REMAND

After appellant, Vith Loch, without an agreed punishment recommendation from the State, pleaded guilty before a jury to the offense of murder,[1] the jury assessed his punishment at confinement for life and a $10,000.00 fine. In two

[1] TEX. PENAL CODE § 19.02(b)(1).

issues,[2] appellant contends that (1) the trial court erred in failing to make findings required by Texas Code of Criminal Procedure 26.13 before accepting his guilty plea and (2) his guilty plea was involuntary because there is no evidence in the record about whether appellant knew the constitutional rights he was waiving by pleading guilty. In its sole cross-issue, the State requests reformation of the judgment.

We modify the judgment, and, as modified, we affirm.

BACKGROUND

In 2004, police were called to a salvage yard in Harris County where the body of the complainant, Soeuth Nay, had been discovered. No arrests were made at the time, but, in 2015, Detective R. Minchew of the Harris County Sheriff's Department's cold case unit received a call from a relative of the complainant and began investigating the case again. His investigation led to several witnesses who

[2] Appellant also argued that the trial court erred in not admonishing him of the potential immigration consequences of his guilty plea. A panel of this Court agreed, holding that the trial court erred in not properly admonishing appellant and that its failure to do so was not harmless. *See Loch v. State*, No. 01-16-00438-CR, 2018 WL 3625190, at *3 (Tex. App.—Houston [1st Dist.] July 31, 2018), *reversed*, 621 S.W.3d 279 (Tex. Crim. App. 2021). The Texas Court of Criminal Appeals disagreed, holding that "even had [appellant] been properly admonished it would not have had an impact on his decision to plead guilty." *See Loch v. State*, 621 S.W.3d 279, 285 (Tex. Crim. App. 2021). The Court of Criminal Appeals reversed our judgment and remanded the case to this Court "for resolution of Appellant's remaining points of error." *Id.* Thus, in this appeal, we address only the issues not addressed in this Court's first opinion.

eventually testified at trial, a confession by appellant, and, ultimately, appellant's arrest, indictment, and conviction.

The Arraignment

At his arraignment, the following exchange took place between appellant, counsel for both parties, and the trial court:

> [Trial Court]: Is the State ready?
>
> [Prosecutor]: The State is ready, your Honor.
>
> [Trial Court]: Is the Defense ready?
>
> [Defense Counsel]: Yes, Your Honor.
>
> [Trial Court]: On the enhancement, you wish to select the burglary of a habitation?
>
> [Defense Counsel]: That is correct.
>
> [Trial Court]: Joe, will you arraign Mr. Loch in the murder case. And also he will enter a plea of guilty or not guilty. I believe guilty and also enter a plea to the enhancement paragraph. Please stand up, Mr. Loch.
>
> [Prosecutor]: In the name and by the authority of [the] State of Texas, the duly organized Grand Jury of Harris County, Texas presents in the District Court of Harris County, Texas, that in Harris County, Texas, Vith Loch, hereafter styled the defendant, heretofore on or about August 7, 2004, did then and there unlawfully, and knowingly cause the death of Soeuth Nay, hereafter called the complainant, by shooting the complainant with a deadly weapon, namely, a firearm.
>
> [Trial Court]: To which the defendant pleads guilty or not guilty?
>
> [Defendant]: Guilty, sir.

[Trial Court]: Guilty?

[Defendant]: Guilty.

[Trial Court]: Okay. We will cover this in just one moment, and also the enhancement paragraph.

[Prosecutor]: Before the commission of the offense alleged above on March 14, 1990 in Cause No. 0491623 in the 351st District Court of Harris County, Texas, the defendant was convicted of the felony offense of burglary of a habitation.

[Trial Court]: To which the defendant pleads true or not true?

[Defendant]: True.

[Trial Court]: Okay. You understand by pleading guilty we are proceeding upon the jury finding out that you're pleading guilty to the offense. I'll talk to them tomorrow about that and also you plead true on the one enhancement paragraph, which makes the punishment between 15 years and 99 years or life. You understand that?

[Defendant]: Yes, sir.

[Trial Court]: Okay. For the record, [Defense Counsel], do you want to put on the record that this is Mr. Loch's decision and his decision alone in pleading guilty?

[Defense Counsel]: That is correct, Your Homor.

[Trial Court]: Go right ahead.

[Defense Counsel]: Mr. Loch, I've been working this case for almost a year; is that correct?

[Defendant]: Yes.

[Defense Counsel]: And we have, during that time frame, we have discussed your case at length; is that correct?

[Defendant]: Yes, sir.

[Defense Counsel]: And I have discussed all potential defensive theories and strategies in this case?

[Defendant]: Yes, sir.

[Defense Counsel]: You also understand that I have filed several motions, mainly being a Motion to Suppress evidence, namely, your statement. Do you understand that?

[Defendant]: Yes, sir.

[Defense Counsel]: And you understand that I've indicated that I thought that it was a trial strategy to pursue.

[Defendant]: Yes.

[Defense Counsel]: But you have instead decided to go ahead with the plea of guilty in this cause, in lieu of going that route; is that correct?

[Defendant]: Yes.

[Defense Counsel]: Is that your desire to not only plead guilty but to have the jury assess punishment in this case?

[Defendant]: Yes, sir.

[Defense Counsel]: Nothing further, Your Honor.

[Trial Court]: Mr. Loch, on your plea of guilty in the arraignment right now, you are going to remain on the same bond until the jury finds you guilty and that will be sometime this week. You may remain on bond. Just be back here, be back here at 9:00 o'clock, just to make sure you're here and we will pick a jury tomorrow afternoon. Okay.

Voir Dire

During voir dire proceedings, during which appellant was present, the trial court told the jury as follows:

> Mr. Loch is presumed to be innocent as he is, but Mr. Loch, and this is unusual, we haven't done this in a long time. Mr. Loch is going to enter a plea of guilty, not not guilty, before the jury. And based upon that, you are going to hear the case as you would normally hear a contested case of guilty or not guilty because you need to hear all of the facts of the case in order to decide the appropriate punishment.
>
> So, in effect, we are going to select you over here and the State is going to present their case first. Then the Defense will present their case and in effect at that time I will read you the charge and I'll charge you to find the defendant guilty based upon his plea and the Court is convinced that it's a competent plea, he's mentally competent. It's freely and voluntarily given by the accused. And I'll say to you, please find him guilty, and your decision based upon his plea of true to the enhancement paragraph, the punishment range will be between 15 years and 99 years or life and up to a $10,000 fine. That fine is optional. You may or may not decide a fine is appropriate in this case.
>
> * * * *
>
> But if the State puts on their case and I instruct you to find him guilty and find the enhancement paragraph to be true, that will be your range of punishment, so I will also, in that charge, if I find it to be that Mr. Loch is mentally competent and that his plea of guilty and true to you is voluntarily and freely given, then I will instruct you in that regard.

Guilty Plea Before the Jury

On the first day of trial, appellant was called to plead before the jury as follows:

> [Prosecutor]: In the name and by the authority of the State of Texas, the duly organized Grand Jury of Harris County, Texas presents in the District Court of Harris County, Texas that in Harris County, Texas, Vith Loch, hereafter styled the defendant, heretofore on or about August 7, 2004, did then and there unlawfully and knowingly cause the death of Soeuth Nay, hereinafter called the complainant, by shooting the complainant with a deadly weapon, namely a firearm.
>
> [Trial Court]: To which the defendant pleads guilty or not guilty?
>
> [Defendant]: Guilty.
>
> [Trial Court]: Thank you. The enhancement paragraph.
>
> [Prosecutor]: Before the commission of the offense alleged above, on or about March 14, 1990, in Cause No. 0550264 in the 351st District Court of Harris County, Texas, the defendant was convicted of the felony offense of burglary of a habitation.
>
> [Trial Court]: To which the defendant pleads true or not true?
>
> [Defendant]: True.

Trial Testimony

Tavey Mao, the complainant's cousin, testified that he saw appellant threaten the complainant with a firearm near the time of his murder.

Mary So, who was in a "relationship" with appellant, testified that she had a child with appellant when she was 13 years old and another when she was 16 years old. Appellant was 10 years older than her. Mary testified that appellant was violent and even knocked her unconscious around the time she returned home from the hospital after giving birth to their second son. After they broke up, appellant showed up at Mary's home late one night in 2004. He was nervous and told her

that the police were looking for him. When he asked to stay with her, Mary refused. Two years later, appellant called Mary, and during that conversation, he admitted to her that he killed the complainant.

Navey Mo testified that she thought highly of the complainant, who she referred to as Mario, and that their families had hoped they would get married when she was older. She also testified that she feared appellant. When she was twelve or thirteen, appellant kissed Navey against her will while she babysat for his son. Navey told Mario, the complainant, that appellant had a crush on her. Soon thereafter, Mario went missing. Around the same time, appellant called Navey to tell her that the complainant "was gone." Shortly thereafter, appellant offered to buy Navey a coke, so she got into his car. She testified that she went with him because she was scared to refuse his offer. She further testified that he drove her to a motel where he sexually assaulted her.

Appellant's former "girlfriend" and the mother of two of his children, Nikki Hiem, testified that they began a "relationship" when she was fifteen years old, and he was much older. During their on-and-off relationship, which lasted for six or seven years, appellant was violent towards Nikki and would point a firearm at her when he was angry. Nikki testified that appellant even fired a shot at her one time while she was pregnant. On the night of complainant's murder, appellant insisted that she go to work even though she was not scheduled to do so. He did not answer

his phone when she called him after her shift to get a ride home, despite attempting to reach him numerous times. Nikki took a cab home and discovered appellant had left their two young children home alone. Appellant arrived home later that night and went straight to the bathroom where he washed his hands and clothing. Nikki testified that their family fled to live with appellant's mother in Alvin and that, within a month, appellant moved to Florida. Appellant later admitted to Nikki that he shot and killed the complainant.

Stipulated Prior Felonies and Appellant's Confession

During trial, the State admitted into evidence a stipulation of evidence executed by appellant, which provided:

> I, the Defendant in the above entitled and numbered cause, in open court, agree to stipulate the evidence in this case and I waive the appearance, confrontation, and cross-examination of witnesses. I consent to the oral stipulation of evidence and to the introduction of affidavits, written statements of witnesses and other documentary evidence. I waive my right against self-incrimination and confess the following facts:

Listed beneath the paragraph above were six prior convictions: three in Texas and three in Florida. A second stipulation of evidence regarding a lab report from the complainant's autopsy contained the following recitation:

> I, the Defendant in the above entitled and numbered cause, in open court, agree to stipulate the evidence in this case and I waive the appearance, confrontation, and cross-examination of witnesses. I consent to the oral stipulation of evidence and to the introduction of affidavits, written statements of witnesses and other documentary evidence.

In a statement made by appellant to law enforcement officers at the time of his arrest, which was also admitted into evidence, appellant admitted to killing the complainant.

Jury Charge and Verdict

In accordance with its statements to the jury during voir dire, the trial court instructed the jury in the jury charge as follows:

> The defendant has entered a plea of guilty to the offense of murder as alleged in the indictment[.]
>
> [language from indictment omitted]
>
> Notwithstanding that, the Court, as required by law, has admonished him of the consequences. It plainly appearing to the Court that the defendant is mentally competent, and that he makes this plea freely and voluntarily, said plea is received by the Court. You are instructed to find the defendant guilty of the offense of murder, as charged in the indictment, and assess the punishment in this cause.
>
> * * * *
>
> You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

The jury, as instructed, found appellant guilty of murder, then assessed his punishment at confinement for life and a $10,000 fine.

PLEA ADMONITIONS

In his second issue, appellant contends that the trial court committed reversible error by "fail[ing]" to make the findings required by [Article 26.13(a) of the Texas Code of Criminal Procedure] before accepting Appellant's guilty plea." Specifically, appellant argues that "of the five admonishments the court was required to give, it complied with only one: a statement of the range of punishment appellant faced."

To ensure that trial courts enter and accept only a constitutionally valid pleas and to assist trial courts in making the determination that a defendant's relinquishment of rights is made knowingly and voluntarily, Texas law requires trial courts to make certain admonishments to defendants before accepting pleas of guilty. TEX. CODE. CRIM. PROC. art. 26.13(a). Accordingly, "[p]rior to accepting a plea of guilty . . . the court shall admonish the defendant of":

> (1) the range of the punishment attached to the offense;
>
> (2) the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. Provided that the court shall inquire as to the existence of a plea bargain agreement between the state and the defendant and, if an agreement exists, the court shall inform the defendant whether it will follow or reject the agreement in open court and before any finding on the plea. Should the court reject the agreement, the defendant shall be permitted to withdraw the defendant's plea of guilty or nolo contendere;
>
> (3) the fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and the defendant's attorney, the trial court must give its

> permission to the defendant before the defendant may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial;
>
> (4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law; and
>
> (5) the fact that the defendant will be required to meet the registration requirements of Chapter 62, if the defendant is convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter.

TEX. CODE CRIM. PROC. art. 26.13(a) (since amended).

In this case, the State concedes that "the record on appeal does not demonstrate that appellant received the 26.13 warnings in this case." Therefore, the trial court committed error. *See VanNortrick v. State*, 227 S.W.3d 706, 708 (Tex. Crim. App. 2007). However, because failure to follow the mandate of Article 26.13 is a non-constitutional error, any error that does not affect appellant's substantial rights will be held to be harmless. *See* TEX. R. APP. P. 44.2(b).

To determine whether appellant's substantial rights have been affected, we must review the entire record. *Anderson v. State*, 182 S.W.3d 914, 919 (Tex. Crim. App. 2006). There is no burden on either party to prove harm or harmlessness resulting from the error. *VanNortrick*, 227 S.W.3d at 709. While we may draw reasonable inferences from the record, we may not use mere supposition. *Id.* at 711.

Here, the trial court gave the first admonishment, and the Texas Court of Criminal Appeals has already held that the trial court's failure to give the fourth admonishment was not reversible error. *See Loch*, 621 S.W.3d at 285. Admonishments two, three, and five do not apply because there was no punishment agreement with the State and appellant was not convicted of a sex crime. *See Anderson v. State*, 182 S.W.3d 914, 917 n.3 (Tex. Crim. App. 2006) (quoting *Richards v. State,* 562 S.W.2d 456, 458 n.1 (Tex. Crim. App. 1978) and stating that because "[p]lea of guilty was before a jury and therefore obviates the necessity of admonishing appellant that the prosecuting attorney's recommendation was not binding on the court"); *Gamble v. State*, 199 S.W.3d 619, 622 (Tex. App.—Waco 2006, pet. ref'd). Thus, appellant's substantial rights were not affected by the trial court's failure to provide the second, third, and fifth admonishments required by Article 26.13(a).

Accordingly, we overrule issue two.

VOLUNTARINESS OF PLEA

In issue three, appellant, relying on *Boykin v. Alabama*, 395 U.S. 238 (1969), argues that the trial court erred because "[t]he record is completely silent about whether Appellant knew the constitutional rights he was waving by his guilty plea, and whether his plea was voluntary." In *Boykin*, the Supreme Court held that the constitutional rights waived by a guilty plea—the right to a trial by jury, the right

to confront witnesses, and the right against self-incrimination—cannot be presumed on a silent record. *Id.* at 243. For such a waiver to comport with due-process requirements, the defendant must enter his plea with a full understanding "of what the plea connotes and of its consequence" and his understanding of such must affirmatively be "spread on the record." *Id.* at 242.

Our sister court of appeals has recently discussed what sort of showing must be "spread on the record," stating as follows:

> *Boykin* did not explain the meaning of its "spread on the record" requirement. *See Aguirre-Mata v. State*, 125 S.W.3d 473, 475 (Tex. Crim. App. 2003) ("*Boykin* did not specifically set out what due process requires to be 'spread on the record' except to say generally that state courts should make sure that a guilty-pleading defendant 'has a full understanding of what the plea connotes and of its consequence.'"). In the absence of a more particularized holding in *Boykin*, the Texas Court of Criminal Appeals has decided that even when the defendant does not receive formal admonishments about his rights from the trial court, due process is satisfied "so long as the record otherwise affirmatively discloses that the defendant's guilty plea was adequately informed." *See Davison v. State*, 405 S.W.3d 682, 687 (Tex. Crim. App. 2013). The Court of Criminal Appeals has also explained that an inference of the defendant's understanding can be made when the defendant is represented by counsel and there is overwhelming evidence that the defendant's guilty plea was part of a defensive strategy. *Compare Gardner v. State*, 164 S.W.3d 393, 399 (Tex. Crim. App. 2005) (holding that the guilty plea comported with due process because the record affirmatively showed a strategy to ask the jury for community supervision), *with Boykin*, 395 U.S. at 240, 89 S. Ct. 1709 ("Trial strategy may of course make a plea of guilty seem the desirable course. But the record is wholly silent on that point and throws no light on it.").

Abrego v. State, 611 S.W.3d 139, 141 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

On a record very similar to that in this case,[3] the *Abrego* court concluded that "the record establishes that appellant knowingly and voluntarily waived his constitutional rights when he pleaded guilty." *Id.* at 143. In so holding, the court of appeals noted that appellant's defensive strategy—to plead guilty and then put on evidence of mitigating circumstances—was apparent from the record and "was presumably made in consultation with competent counsel." *Id.* at 142. The court also considered discussions during voir dire that (1) indicated that the defendant had been informed of his rights and waived them, (2) made reference to the defendant's right to confront witnesses by mentioning that the complainant would be testifying, and (3) told the jury that appellant had a Fifth Amendment right not to testify. The court concluded that "[t]hese statements, all of which occurred in appellant's presence, support an inference that appellant was aware of his constitutional rights, even though he received no specific admonishment about those rights at the time he pleaded guilty." *Id.*

In this case, there are many of the same indicia of competency and voluntariness that were present in *Abrego*. First, it was apparent from the record

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[3] We note that in both *Abrego* and in this case, the appellant pleaded guilty before a jury, the case went to trial on punishment, and the trial court's admonishments to the appellant, to the extent given, do not appear in writing or verbally in the transcription of the trial.

that appellant's trial strategy was to plead guilty and, "as a good Christian," to take responsibility for his actions and to provide closure to the complainant's family, and then to ask the jury for a more lenient punishment.[4] As in *Abrego*, it was clear from the record that appellant's trial strategy was arrived at after consultation with competent counsel. Counsel noted on the record that he and appellant "discussed all potential defensive theories and strategies in this case." Counsel, in fact, had suggested moving to have the confession suppressed, but appellant, himself, chose to plead guilty. *See Gardner*, 164 S.W.3d at 399 ("The voluntary nature of appellant's guilty plea is further shown in the record by the overwhelming evidence that appellant's guilty plea was part of a strategy (which we may also infer was done in consultation with competent counsel) to persuade the jury to grant appellant probation.").

And, besides appellant's trial strategy to plead guilty and seek leniency from the jury, there were other indications that appellant was aware of his constitutional rights. There was evidence that the trial court had considered appellant's competence and the voluntariness of his plea, stating to the jury at voir dire that after appellant's plea, "I'll charge you to find the defendant guilty based upon his plea and the Court is convinced that it's a competent plea, he's mentally competent

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[4] During closing arguments, defense counsel stated that appellant had found Christ, had confessed, and was "asking for forgiveness." He asked the jury to assess punishment at 20 years' confinement.

. . [i]t's freely and voluntarily given by the accused." The trial court also mentioned at voir dire that both parties had the right to bring evidence, stating, "[T]he State will offer anything else it might think is appropriate for you to decide this case and the Defense will do the same thing" and that the "defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way." These statements, made in appellant's presence, were an indication that appellant knew of his right to a jury trial, to testify, and to confront witnesses. *See Abrego*, 611 S.W.3d at 142 (holding trial court's statements at voir dire "all of which occurred in appellant's presence, support an inference that appellant was aware of his constitutional rights, even though he received no specific admonishments regarding those rights at the time he pleaded guilty").

In addition, the two stipulations of evidence signed by appellant and admitted into evidence in this case specifically reference his constitutional rights of confrontation, cross-examination, and against self-incrimination, thus indicating appellant's familiarity with those rights, and that he *specifically* waived them as to certain pieces of evidence admitted at trial.

Also, the jury charge noted that appellant had pleaded guilty and "the Court, as required by law, ha[d] admonished him of the consequences." This statement by the trial court in the jury charge is some evidence that, even though not appearing

in the record, appellant had been admonished of the consequences of his plea. Additionally, the trial court represented in the jury charge that "the defendant is mentally competent, and that he makes this plea freely and voluntarily, said plea is received by the Court." Again, this representation by the trial court is some evidence of the trial court's compliance with the requirement that "[n]o plea of guilty . . . shall be accepted by the trial court unless it appears that the defendant is mentally competent, and the plea is free and voluntary." *See* TEX. CODE CRIM. PROC. art. 26.13(b).

Finally, we note that the record shows that appellant had pleaded guilty six previous times—three times in Texas and three times in Florida. Both states require similar admonishments regarding voluntariness, competence, and constitutional rights. *See* TEX. CODE CRIM. PROC. art. 26.13 and FLA. R. CRIM. P. 3.172. Appellant's familiarity with guilty pleas supports a conclusion that he was aware of his constitutional right to a jury, to confront witnesses, and against self-incrimination.

Unlike *Boykin*, the record in this case is not "totally silent" with respect to appellant's knowledge of his constitutional rights and "spread on the record" there is sufficient indicia to show that appellant's guilty plea was freely and voluntarily made.

We overrule issue three.

REFORMATION OF JUDGMENT

In a single cross-issue, the State requests that we "correct a clerical error in the judgment which inaccurately reflected that appellant plead[ed] not true to both enhancements and the jury found them true." The State further contends that "the reporter's record and jury verdict show the State abandoned the first enhancement paragraph, and on the second, appellant pled true and the jury found it true."

We agree that the record shows that the State abandoned the first enhancement alleging aggravated assault, and that appellant pleaded "true" to the second enhancement alleging burglary of a habitation. However, the trial court's judgment states that appellant pleaded "not true" to both enhancements.

An appellate court has the power to correct and reform a trial court judgment to make the record speak the truth when it has the necessary data and information to do so. *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd)).

Accordingly, we grant the State's request, and we modify the trial court's judgment to reflect that the State "abandoned" the first enhancement paragraph and findings on that enhancement are "not applicable." We further modify the judgment to reflect that appellant pleaded "True" to the second enhancement paragraph. *See* TEX. R. APP. P. 43.2(b) ("Court of Appeals may . . . modify the trial

court's judgment and affirm it as modified."); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Torres v. State*, 391 S.W.3d 179, 185 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (modifying judgment to state that defendant pleaded "true" to allegations in enhancement paragraphs).

CONCLUSION

We affirm the trial court's judgment as hereinabove modified.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.

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