Affirmed and Memorandum Opinion filed December 16, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00868-CR
NO. 14-09-00869-CR

ARRINGTON FLOYD BURLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause Nos. 1169232, 1169233

MEMORANDUM OPINION

A jury convicted appellant Arrington Floyd Burley of aggravated kidnapping and aggravated robbery with a deadly weapon and assessed punishment at 15 years' confinement for the kidnapping and 20 years' confinement for the robbery with sentences to run concurrently. Appellant's sentence was enhanced by a single prior felony conviction, and he now challenges his sentence on the ground that the enhancement allegations in the indictments were not read to the jury and he did not enter a plea to the enhancement paragraphs prior to sentencing. We affirm.

BACKGROUND

Appellant was indicted for the aggravated kidnapping and aggravated robbery of Alfredo Gonzalez. Each indictment contained an enhancement paragraph alleging that appellant was previously convicted of the felony of robbery. After voir dire and outside the presence of the jury, appellant pleaded not guilty to the two offenses charged in the indictments, but the reporter's record does not reflect that he pleaded to the enhancement allegations at that time.

The indictments were also read to the jury, and appellant pleaded not guilty in open court. The jury ultimately rendered a verdict of guilty on both counts. Prior to the punishment phase of the trial, appellant and the State entered into a written "stipulation of evidence." In the stipulation, appellant waived his rights to appear, confront witnesses, and cross-examine witnesses, and he admitted that he was the same person convicted of two prior felonies and a misdemeanor. One of the felonies he stipulated to was the same felony of robbery alleged in the indictment for enhancement purposes.

Outside the presence of the jury, the court recited the basic terms of the stipulation to the defendant. In particular, the court stated that appellant "purports to stipulate that he is the same Arrington Burley that was convicted of the felony offense of robbery in the 183rd District Court on May 12, 2006, as alleged in the enhancement paragraph." Appellant acknowledged that this was his stipulation, he signed it, and he entered into it freely. The court further warned appellant: "Now, you understand that you have the right to have the State put on evidence to actually prove up that these prior convictions are you with the use of a fingerprint expert and so forth. Is it your desire not to do that and just let them prove it up on this paperwork evidence?" Appellant responded affirmatively. The court then announced that the stipulation was entered into freely and voluntarily, and the court approved it to be offered into evidence.

The jury was brought into the courtroom, and the State offered the stipulation into evidence. The court asked if appellant objected, and appellant's counsel did not object.

The State then read the stipulation to the jury and rested. Appellant presented no evidence and rested, and the jury was excused. The reporter's record does not reflect that the enhancement allegations were read to the jury, nor does it reflect that appellant pleaded "true" or "untrue" to the allegations prior to the jury's excusal. The court then asked if there were any objections to the jury charge, and appellant's counsel said no.

Appellant's counsel, in closing remarks to the jury, acknowledged that "we have pled true" to the stipulation. While discussing the punishment range for the robbery conviction, counsel explained: "Because that has been pled true to, . . . and you know that he has an enhancement, the range of punishment . . . gets moved up. The range of punishment is 15 to life." Again, while addressing the "safe release" provision of the kidnapping charge, counsel explained the range of punishment would be five to life "because there's an enhancement."

The docket in this case states that the defendant pleaded true to the stipulation of evidence. The jury charges state that the indictments included an enhancement for the felony of robbery, and "[t]o this allegation in the enhancement paragraph of the indictment the defendant has pleaded 'True'. You are instructed that you are to find 'True' the allegations of the enhancement paragraph of the indictment." Finally, the court's judgments for the kidnapping and robbery convictions both state that appellant pleaded true to the enhancement allegations.

Appellant did not argue in the trial court that he did not plead true to the enhancement allegations or that the allegations were not read to the jury. He did not file a motion for new trial, a bill of exception, or a motion to arrest judgment. This appeal followed.

ANALYSIS

Article 36.01 of the Texas Code of Criminal Procedure sets out the basic procedures for a trial before a jury. The prosecuting attorney must read the indictment or information to the jury, and the defendant's plea must be stated. TEX. CODE CRIM. PROC.

ANN. art. 36.01(a)(1)–(2) (West 2007). When prior convictions are alleged for purposes of enhancing the sentence, that portion of the indictment or information should not be read to the jury until the hearing on punishment is held. *Id.* art. 36.01(a)(1); *Cox v. State*, 422 S.W.2d 929, 930 (Tex. Crim. App. 1968). The reading of the indictment is mandatory, and when there is no plea to the indictment, then no issue is joined upon which to try the defendant. *Turner v. State*, 897 S.W.2d 786, 788 (Tex. Crim. App. 1995) (citing *Warren v. State*, 693 S.W.2d 414, 415 (Tex. Crim. App. 1985)). If an issue is not joined, then any evidence presented on the matter is "not properly before the jury." *Welch v. State*, 645 S.W.2d 284, 285 (Tex. Crim. App. 1983). This rule applies with equal force to the reading of and pleading to enhancement allegations at the penalty phase of a trial before a jury. *Turner*, 897 S.W.2d at 788; *Welch*, 645 S.W.2d at 285; *Linton v. State*, 15 S.W.3d 615, 620 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Appellant argues for the first time on appeal that the failure to read the enhancement allegations to the jury and to take his plea on the allegations is reversible error. By failing to raise this issue in the trial court, appellant has not preserved error for our review. *See Marshall v. State*, 185 S.W.3d 899, 903 (Tex. Crim. App. 2006) (explaining that a defendant must object when he has "notice that the proceedings may have gone amiss," and he has this notice when he learns that the State is seeking a higher penalty despite the enhancement allegations not being read to the jury, and a defendant learns that the State is seeking a higher penalty when enhancement allegations are contained in the indictment); *Warren*, 693 S.W.2d at 416 (explaining that the error of failing to read and plead to enhancement allegations "can be *preserved* by means of a motion for new trial, bill of exception, or motion to arrest judgment" (emphasis added)); *Lee v. State*, 239 S.W.3d 873, 876–77 (Tex. App.—Waco 2007, pet. ref'd) (holding that the defendant failed to preserve error by not raising the error in the trial court when the indictment was not read to the jury and the defendant did not enter a plea); *Mendez v. State*, 212 S.W.3d 382, 388 (Tex. App.—Austin 2006, pet. ref'd) (holding that the defendant's "objection at any point during the penalty stage [was] sufficient to preserve

the error" of not reading the enhancement allegations and taking the defendant's plea); *see also* TEX. R. APP. P. 33.1.[1]

Further, Rule 44.2(c) of the Texas Rules of Appellate Procedure requires us to presume "that the defendant pleaded to the indictment or other charging instrument" unless the issue was "disputed in the trial court, or unless the record affirmatively shows to the contrary." TEX. R. APP. P. 44.2(c)(4); *see also Sharp v. State*, 707 S.W.2d 611, 616 (Tex. Crim. App. 1986) (presuming the appellant pleaded to the indictment because the appellant's motion for new trial failed to present any evidence that the indictment was not read or a plea not taken, and the judgment and the docket sheet showed that the indictment was read and the appellant pleaded to it). The presumption created by Rule 44.2(c) applies to a defendant's plea to enhancement allegations contained in an indictment. *See Warren*, 693 S.W.2d at 415; *Hunt v. State*, 994 S.W.2d 206, 211 (Tex. App.—Texarkana 1999, pet. ref'd); *Turner v. State*, 860 S.W.2d 147, 150 (Tex. App.—Austin 1993), *rev'd on other grounds*, 897 S.W.2d 786 (Tex. Crim. App. 1995). In *Warren*, the record affirmatively showed that no plea was taken because "the charge did not recite that appellant entered a plea to the enhancement allegations and the recitation in the judgment that the enhancement allegations were read and appellant pleaded thereto was crossed out." 693 S.W.2d at 416

Unlike in *Warren*, the jury charges on punishment in this case state that appellant pleaded true to the enhancement allegations. The judgments also indicate that appellant pleaded true to the enhancements, and so does the docket sheet. Appellant's trial counsel even said to the jury in open court that appellant pleaded true to the enhancements. There

[1] *But see Turner*, 897 S.W.2d at 787 ("[T]he Court of Appeals addressed the merits of the issue because 'reading of the charging instrument is a right that must be implemented in the absence of an express waiver.'" (quoting *Turner v. State*, 860 S.W.2d 147, 150–51 (Tex. App.—Austin 1993))); *Essary v. State*, 53 Tex. Crim. 596, 604, 111 S.W. 927, 931 (1908) ("[I]n a case where [the indictment has not been read to the jury,] the burden rests upon the state to show such conduct and acts upon the part of the defendant as may, in fairness, be treated and regarded as a waiver."); *Irvin v. State*, No. 14-93-00922-CR, 1995 WL 704733, at *1 (Tex. App.—Houston [14th Dist.] Nov. 30, 1995, pet. ref'd) (not designated for publication) (holding that the appellant could complain for the first time on appeal that enhancement allegations were not read to the jury).

is no affirmative showing in the record that appellant did not plead to the enhancements. *See Hunt*, 994 S.W.2d at 211 ("Silence in the record does not amount to an affirmative showing." (quotation omitted)). Accordingly, we must presume that appellant pleaded to the enhancement allegations.

We further conclude that any error in not reading the indictment to the jury was harmless. *See* TEX. R. APP. P. 44.2(b). A non-constitutional error must be ignored unless it affects a substantial right. *Id.* In *Turner*, the Court of Criminal Appeals explained that failing to read the enhancement paragraphs of an indictment and not taking the defendant's plea was harmful because it could "mislead a defendant into believing the State has abandoned the enhancement paragraphs," which could cause the defendant to incriminate himself. 897 S.W.2d at 789. In *Linton*, we recognized that the harmless error rule applies to the failure to read and plead to enhancement allegations, and we held that no harm results when a defendant is not misled into believing that the State abandoned the allegations and the defendant does not incriminate himself. 15 S.W.3d at 620–21.[2]

Here, appellant entered into a written stipulation agreeing that he was the same person convicted of the felony offense of robbery, and the trial court explained to appellant before accepting the stipulation that this robbery conviction was the same one alleged in the enhancement paragraphs. Thus, appellant was on notice that the State had not abandoned the enhancements. Appellant did not take the witness stand or offer any evidence at sentencing—he did not incriminate himself. Finally, appellant's counsel repeatedly said to the jury that appellant pleaded true to the enhancements and that the penalty would increase accordingly. Under these facts, we cannot say that the failure to read the enhancement paragraphs impaired a substantial right.

[2] *But see Mendez v. State*, 212 S.W.3d 382, 389 (Tex. App.—Austin 2006, pet. ref'd) (holding that the error was harmful because there was no other properly admitted evidence before the jury that would allow for a finding that the enhancement allegations were true); *Braun v. State*, No. 2-08130-CR, 2009 WL 579299, at *3 (Tex. App.—Fort Worth Mar. 5, 2009, pet. ref'd) (mem. op., not designated for publication) (same).

Appellant's issue is overruled, and we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Mirabal.*

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

* Senior Justice Margaret Garner Mirabal sitting by assignment.