Reversed and Remanded and Memorandum Opinion filed July 21, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-01047-CR

ABDERRAHIM ELMAGHRAOUI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1118828

MEMORANDUM OPINION

Abderrahim Elmaghraoui pleaded guilty before a jury to the murder of his wife, Amina Fettach. After hearing evidence, the jury made a negative finding to the special issue of sudden passion and assessed punishment at seventy-five years' imprisonment. On appeal, appellant contends the evidence is factually insufficient to support the jury's finding that he did not cause Fettach's death under the influence of sudden passion. Appellant also contends his guilty plea was involuntary because the trial court failed to admonish him concerning the range of punishment and the deportation consequences of his plea. After reviewing the record, we agree that the trial court erred in failing to give

the required admonishment concerning deportation consequences and that the error was harmful. We reverse the trial court's judgment and remand for further proceedings.

I

Appellant and Fettach were married and moved to the United States from Morocco in 2003 with their son. On May 29, 2007, appellant stabbed Fettach with a knife seventeen times, killing her. Appellant was indicted for murder.

After the jury was selected for his trial, appellant decided to plead "guilty" to the offense and elected to have the jury assess punishment. Before the start of the trial, outside the presence of the jury, the trial court asked appellant several questions to determine whether appellant's plea was voluntary. But the trial court did not admonish appellant concerning the range of punishment or that, if appellant is not a United States citizen, a guilty plea may result in deportation, exclusion from admission to the United States, or the denial of naturalization under federal law.

II

A

Before accepting a plea of guilty or a plea of nolo contendere, the court is required to admonish the defendant of certain facts, including that if the defendant is not a citizen of the United States, a plea of guilty or nolo contendere for the offense charged may result in deportation, exclusion from admission to this country, or the denial of naturalization under federal law. Tex. Code Crim. Proc. art. 26.13(a)(4). The trial court's failure to admonish a defendant as required by article 26.13 is a statutory error rather than a constitutional error. *Fakeye v. State,* 227 S.W.3d 714, 716 (Tex. Crim. App. 2007). Accordingly, the error must be disregarded unless it affects the defendant's substantial rights. Tex. R. App. P. 44.2(b).

The Court of Criminal Appeals has instructed that the question to decide in applying Rule 44.2(b) to the failure to give an admonition is, considering the record as a whole, "do we have a fair assurance that the defendant's decision to plead guilty would not have changed had the court properly admonished him?" *Anderson v. State*, 182 S.W.3d 914, 919 (Tex. Crim. App. 2006). In determining whether the trial court's failure to admonish the appellant affected his substantial rights, we conduct an independent examination of the record as a whole. *VanNortrick v. State,* 227 S.W.3d 706, 709 (Tex. Crim. App. 2007). Neither party has the burden to prove harm or harmlessness. *Id.* We consider the following relevant issues: (1) whether the appellant knew the consequences of his plea; (2) the strength of the evidence of the appellant's guilt, and (3) the appellant's citizenship and immigration status. *Id.* at 712.

B

We first examine the record for any indication that appellant already knew the deportation and immigration consequences of his plea. *See id.* The Court of Criminal Appeals has noted that a trial court's failure to admonish a non-citizen defendant concerning the consequences of his plea would have far less impact on his decision to plead guilty if he were already aware of the particular consequences. *Gutierrez-Gomez v. State*, 321 S.W.3d 679, 681–82 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Anderson*, 182 S.W.3d at 920).

The State concedes there is no direct evidence appellant was already aware of the deportation and immigration consequences of his plea. But the State suggests that we may reasonably infer that appellant was aware of the consequences because he "asked the State to contact his consulate, had four different lawyers in the process of this case, and apprised the trial judge that he had discussed the guilty plea with his attorney." We disagree. At most, this evidence suggests that appellant was a non-citizen at the time of his arrest and that he had privileged communications with counsel; it does not support an inference that appellant was aware that if he pleaded guilty he could be deported,

excluded from admission to this country, or denied naturalization. When the record is silent regarding the consequences of conviction in the context of a guilty plea, the court must infer that the defendant did not know the consequences of his plea. *See VanNortrick*, 227 S.W.3d at 711–12; *see also Song Sun Hwang v. State*, 130 S.W.3d 496, 500–501 (Tex. App.—Dallas 2004, pet. ref'd) (holding record insufficient to support inference appellant knew consequences of his plea when record "contains opaque references to deportation but . . . is silent about whether appellant was actually informed that a guilty plea could result in his deportation").

The State also argues that the evidence of appellant's guilt is so strong that we should conclude that "this is the rare case when the deportation admonishment would not have changed appellant's decision to plead guilty." The State asserts that appellant pleaded guilty voluntarily with the advice of his counsel because he killed his wife, and the only real issue in the case was punishment. But the Court of Criminal Appeals has rejected this argument in another case involving a guilty plea. In *VanNortrick v. State*, the appellant pleaded guilty to the felony offense of aggravated sexual assault of a child under the age of fourteen. 227 S.W.3d at 707. While acknowledging that the evidence of the appellant's guilt was strong, the *VanNortrick* court nevertheless held that, when the record does not support an inference that the appellant was aware of the immigration consequences of his plea, "the strength or weakness of the evidence against the appellant makes little difference to the harm analysis." *Id*. at 713. The court reasoned that, ultimately, it would have no way of knowing what role the defendant's knowledge concerning the consequences of his plea would have on his decision about whether to plead guilty. *Id.* Accordingly, the court concluded, "[r]egardless of the strength of the evidence of guilt, we have no fair assurance that the appellant would not have changed his guilty plea had he been properly admonished." *Id.* [1]

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[1] The State did not attempt to distinguish *VanNortrick* in its appellate brief; indeed, it did not cite *VanNortrick* at all.

Lastly, we turn to the evidence of appellant's citizenship and immigration status. The State concedes that a reasonable inference may be drawn from the evidence that appellant is an immigrant. When appellant was arrested, he indicated that he was a citizen of Morocco. He also requested that the Moroccan consulate be contacted. At trial, appellant testified through an Arabic interpreter that he was born in Morocco and he spoke very little English. Both appellant and his son testified that their family moved to the United States from Morocco in 2003 via a "lottery." The testimony concerning the lottery was not well-developed, and there is no evidence to indicate whether appellant subsequently became a United States citizen. The Court of Criminal Appeals has held that when the trial court fails to admonish a defendant about the immigration consequences of his guilty plea, a record that is silent on the defendant's citizenship or that is insufficient to determine citizenship establishes harmful error. *See VanNortrick*, 227 S.W.3d at 710–14 (refusing to draw inference that appellant was a citizen based on prior felony conviction that did not result in deportation).

In this case, as in *VanNortrick*, the evidence of appellant's guilt may be strong, but there is no evidence to suggest that appellant was aware of the deportation and immigration consequences of his plea. Further, the trial court wholly failed to admonish appellant concerning the deportation and immigration consequences of his guilty plea, and there is at least some evidence in the record to support a reasonable inference that appellant was a non-citizen when he pleaded guilty. Therefore, we conclude that the trial court's error in this case was harmful. *See id.* at 713–14; *see also Stevens v. State*, 278 S.W.3d 826, 829 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *VanNortrick* and holding that, when record is silent as to defendant's citizenship and deportation consequences of his plea, appellate court must infer that defendant did not know the consequences of his plea and therefore the error is harmful).

* * *

We sustain that portion of appellant's second issue concerning the trial court's failure to admonish him concerning the immigration consequences of his plea and therefore do not address the trial court's failure to admonish appellant concerning the range of punishment or appellant's first issue. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Brown, and Christopher.

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