Affirmed as Modified and Majority and Concurring Opinions filed March 22, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00406-CR

FOREST PENTON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1384434

M A J O R I T Y O P I N I O N

Appellant Forest Penton, Jr. asserts the trial court erred in denying his motion to suppress and in rendering a judgment that recites he was convicted of delivery of methamphetamine, a first-degree felony, when, in fact he was convicted of possession of methamphetamine, a second-degree felony. We modify the judgment to reflect that appellant was convicted of the second-degree felony and affirm the judgment as modified.

BACKGROUND

Appellant was a passenger in his nephew's car when Deputy Michael Santos noticed the traffic light turn yellow and the car attempt to speed through the light. The light turned red before the car passed underneath it. Deputy Santos initiated a traffic stop and approached appellant while his partner approached the driver. Deputy Santos testified that as he approached the car, appellant began to squirm around, so he restrained appellant using handcuffs and placed appellant in the back of a patrol car. Deputy Santos recovered two baggies containing a crystal-like substance from the car, and as he was placing the baggies in the patrol car, appellant stated that the "stuff" belonged to him, not to his nephew.

Appellant was charged by indictment with possession with intent to deliver methamphetamine weighing more than four grams and less than two hundred grams.[1] The indictment included two enhancement paragraphs, each alleging a prior felony conviction. Appellant pleaded, "not guilty," to the charge but pleaded "true" to the enhancement paragraphs. Appellant filed a motion to suppress evidence of his oral statements to police officers. The trial court denied the motion to suppress. The jury convicted appellant of the lesser-included offense of possession of methamphetamine and assessed punishment at thirty-two years' confinement.

On appeal, appellant challenges the trial court's ruling on the motion to suppress. In addition, appellant seeks reformation of the judgment to eliminate an error in the description of the offense for which he was convicted.

[1]Throughout this opinion, all references to possession with intent to deliver methamphetamine and all references to possession of methamphetamine refer to methamphetamine in an amount weighing more than four grams and less than two hundred grams.

ISSUES AND ANALYSIS

A. Did appellant preserve error on his suppression issue?

In his first issue, appellant asserts the trial court erred in denying his motion to suppress statements he made to police officers after the traffic stop on the ground that appellant's statements were the result of an illegal detention and an illegal arrest. Appellant asserts that the police officers did not have reasonable suspicion to stop his vehicle. In particular, appellant argues that entering an intersection while a traffic signal is yellow is not a traffic violation, even if the traffic signal turns red before the vehicle passes through the intersection. Appellant also asserts that he was arrested without probable cause and therefore the trial court erred in denying his motion to suppress. The State asserts that appellant failed to preserve error in the trial court on the arguments under appellant's first issue because appellant's motion to suppress was not specific enough to alert the trial judge to the complaint appellant now raises on appeal.

Appellant was required to preserve error in the trial court as to his first issue. *See Pabst v. State*, 466 S.W.3d 902, 907 (Tex. App.—Houston [14th Dist.] 2015, no pet.). To preserve an issue for appellate review, a party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. *See* Tex. R. App. P. 33.1(a); *Pabst*, 466 S.W.3d at 907. The appellate complaint must comport with the specific complaint that appellant timely lodged in the trial court. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Even constitutional errors may be waived by failure to timely complain in the trial court. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).

It violates "ordinary notions of procedural default" for an appellate court to

reverse a trial court's decision on a legal theory not timely presented to the trial court by the complaining party. *See Hailey v. State*, 87 S.W.3d 118, 122 (Tex. Crim. App. 2002); *Pabst*, 466 S.W.3d at 907. The complaining party must have conveyed to the trial court the particular complaint raised on appeal, including the precise and proper application of law as well as underlying rationale. *See Pena v. State*, 285 S.W.3d 459, 463–64 (Tex. Crim. App. 2009); *Pabst*, 466 S.W.3d at 907. Clarity is required, but litigants need not employ specific words to avoid forfeiting their complaints. *Vasquez v. State*, — S.W.3d —,—, 2016 WL 735786, at *3 (Tex. Crim. App. Feb. 24, 2016). The key to effective preservation of error is letting the trial court know what the objecting party wants and why the objecting party claims entitlement to that relief and conveying these points in terms that are clear enough for the judge to understand. *Id.* A general or imprecise objection will not preserve error for appeal unless it is clear from the record that the legal basis for the objection was obvious to the court and opposing counsel. *Id.*

In his motion to suppress, appellant asserted, in relevant part, that "the alleged statements herein are the product of an unlawful arrest, illegal detention, and an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution" and "the alleged statements were obtained in violation of the Defendant's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas; and Chapter 14 and Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure." In the motion appellant did not specify why he believed the arrest was unlawful or the detention illegal, nor did appellant identify any legal theory to suggest why the arrest was unlawful or the detention illegal. At the hearing on the motion to suppress evidence, appellant waived his right to open and close. Though appellant

questioned witnesses, he did not offer any legal argument to the trial court. Nor did appellant question the witnesses in such a way that his appellate complaints were apparent from the context of his questions during the hearing. Appellant did not unpack the broad assertions he made, nor did he provide details or supporting points that might have made the basis for the requested relief evident to the trial court.

Appellant points out that the trial judge made a fact-finding and a conclusion of law related to his appellate complaints. But, the trial court's finding does not show the trial court understood appellant to be objecting to the detention as illegal because the police officer did not have reasonable suspicion that appellant committed a traffic violation. *See Vasquez*, — S.W.3d at —, 2016 WL 745786, at *4–*5 (noting that intermediate appellate court's reliance on findings of fact to determine appellant's argument in the trial court was misplaced because the findings were issued after the appeals process had begun). The trial court's oral comments at the time of the trial court's ruling indicate the trial court was ruling on the voluntary nature of appellant's statements.

Appellant's objection was too broad and imprecise to place the trial court on notice of the complaints appellant now raises under his first issue. *See id.* at *3–*5. Because appellant's complaint in the trial court was not sufficiently specific to make the trial court aware of his appellate complaints, appellant's arguments under his first issue are not preserved for appeal.[2] *See id.* Accordingly, we overrule appellant's first issue.

B. Does the judgment contain errors?

In urging the second issue, appellant asserts that the judgment incorrectly

[2] We need not and do not address whether appellant preserved error as to complaints not raised in this appeal.

reflects that he was convicted of a first-degree felony, possession with intent to deliver methamphetamine, because appellant was convicted of the lesser-included offense of possession of methamphetamine, a second-degree felony. Appellant requests that we reform the judgment to reflect a conviction for the second-degree felony of possession of methamphetamine. The State concedes error in the judgment and agrees we should grant the requested relief.

The record reflects that the jury did not find appellant guilty of the charged offense of possession with intent to deliver methamphetamine and that the jury found appellant guilty of the lesser-included offense of possession of methamphetamine. Possession of methamphetamine weighing more than four grams and less than two grams is a second-degree felony. *See* Tex. Health & Safety Code Ann. § 481.115(d) (West, Westlaw through 2015 R.S.); Tex. Health & Safety Code Ann. § 481.102(6) (West, Westlaw through 2015 R.S.); *Collins v. State*, 240 S.W.3d 925, 926 (Tex. Crim. App. 2007). The trial court erred in reciting in the judgment that appellant was convicted of the first-degree felony of possession with intent to deliver methamphetamine weighing more than four grams and less than two hundred grams. We therefore sustain appellant's second issue and grant the requested modification. *See French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Musgrove v. State*, 425 S.W.3d 601, 612 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (modifying judgment to reflect correct offense level). Accordingly, we modify the judgment to reflect that appellant was convicted of the second-degree felony of possession of methamphetamine weighing more than four grams and less than two hundred grams.

CONCLUSION

Appellant did not preserve his first issue for appellate review and therefore we overrule his challenge to the trial court's denial of his motion to suppress.

Appellant is entitled to relief on his second issue because the judgment contains an error. Because the judgment incorrectly reflects that appellant was convicted of the first-degree felony of possession with intent to deliver methamphetamine weighing more than four grams and less than two hundred grams, we modify the judgment to delete that recital and instead to reflect appellant's conviction of the second-degree felony of possession of methamphetamine weighing more than four grams and less than two hundred grams. We affirm the trial court's judgment as modified.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan. (Christopher, J. concurring).
Publish — TEX. R. APP. P. 47.2(b).