**Reversed and Remanded and Memorandum Opinion filed August 24, 2017.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-16-00608-CR**

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**DEXTER NARCISSE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 248th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1480336**

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## M E M O R A N D U M  O P I N I O N

A jury found appellant Dexter Narcisse guilty of the offense of unlawful possession of a firearm by a felon, and the trial court, after finding two enhancement paragraphs true, assessed punishment at thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division. In five issues, appellant contends: (1) the trial court erred in considering a prior conviction as both an element of the charged offense and as an enhancement offense elevating the punishment range; (2) the evidence is legally insufficient to support his conviction; (3) his

counsel was ineffective for failing to object to the admission of evidence of a prior conviction; (4) his counsel was ineffective for agreeing to allow a trial amendment to the indictment; and (5) his counsel was ineffective for failing to object to the use of the same prior conviction as an element of the charged offense and as an enhancing offense.

We conclude that legally sufficient evidence supports appellant's conviction and that his counsel was not ineffective for failing to object to the admission of evidence of a prior conviction and agreeing to a trial amendment to the indictment. But because the same prior conviction was used as both an element of the charged offense and as an enhancing offense, we reverse and remand for a new trial on punishment only. We do not reach appellant's final issue in which he claims counsel was ineffective in connection with the issue we have sustained.

## Background

A grand jury indicted appellant with the offense of unlawful possession of a firearm by a felon, enhanced by two prior felony convictions. At his jury trial, the following evidence was adduced.

Numerous Houston Police Department officers converged on an apartment complex in response to a 911 call from a woman reporting that her boyfriend—appellant—had assaulted her and was armed with a knife and a gun. Sergeants Kristi Barnes and Michael Abbassi responded to the call. Shortly after arriving at the complex, they approached the complainant, who pointed at appellant and said, "There he is right there."[1] Barnes noticed that appellant was wearing shorts but no shirt; she recalled that appellant was carrying a black shirt in his hands. When

[1] Barnes and Abbassi initially followed another individual until the complainant identified appellant as her assailant.

appellant saw Barnes, who was in uniform, he ran away through the complex. Barnes and Abbassi pursued him. Appellant pushed through a hole in a fence separating the apartment complex from a nearby bayou. He ran along the bayou toward a wooded area.

As Barnes chased appellant on foot, a nearby patrol car veered off a roadway and drove toward the bayou, cutting off appellant's escape route. Barnes saw appellant "dart" toward the woods as if to enter them, but then appellant stopped and sat down, effectively surrendering to the police. The officer who had been driving the patrol car exited his car, placed appellant in handcuffs, and moved him to the back of another patrol unit. Another patrol officer transported appellant back to the apartment complex.

Meanwhile, Barnes believed appellant might have thrown something into the area toward which he "darted" before surrendering. Although Barnes did not see appellant throw anything,[2] appellant was not carrying a black shirt when the patrol officer apprehended him. Barnes summoned a K9 unit to search appellant's flight path; the K9 officer's dog was trained to detect the scent of firearms. After searching near where Barnes had seen appellant move toward the woods, the K9 officer's dog found a gun wrapped in a black T-shirt. According to Barnes, the dog discovered the shirt and gun in the "same general location" as appellant's path immediately before surrendering, and the recovered shirt was the same color as the shirt Barnes had seen appellant carrying before he was apprehended.

While the K9 unit searched, Abbassi asked appellant where his gun was, but appellant replied that he did not have a gun. Once the gun was recovered, however, appellant became "very talkative." According to an officer at the scene, appellant

[2] Abbassi saw appellant throw something near where appellant pushed through the fence. Abbassi recovered a bag containing marijuana, individually packaged for sale, from that location.

told him, "I'm always a dope dealer and I'll always be armed when I'm selling dope." Another officer at the scene said that appellant told him "that the gun had been found, that the sergeant on the scene was going to be upset with him because he lied to him[,] and that he was glad it was found, he did not want any children getting ahold of it." And according to Abbassi, appellant apologized to him, saying, "You got me, sorry for lying." Barnes explained that appellant also apologized to her: he told Barnes he "knew that he was doing wrong, that he knew that he was not suppose[d] to have a weapon[,] and that he would accept the weapons charge but he only wanted a misdemeanor for the family violence case because he felt like his girlfriend had instigated it by accusing him of being in a robbery."

After hearing the evidence, a jury found appellant guilty of unlawful possession of a firearm by a felon. Appellant elected to have the trial court determine his punishment; after a hearing at which appellant pleaded "true" to the enhancement offenses, the trial court assessed appellant's punishment at thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division. This appeal timely followed.

## Sufficiency of the Evidence

In his second issue, appellant asserts that the evidence is insufficient to support his conviction because the State failed to prove that he possessed the firearm. Because this issue would provide appellant the greatest relief, we address it first. *See Lucas v. State*, 245 S.W.3d 611, 612 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

## A. Standard of review and governing law

We apply a legal-sufficiency standard of review in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). Under this standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. *Temple*, 390 S.W.3d at 360; *Criff v. State*, 438 S.W.3d 134, 136-37 (Tex. App.–Houston [14th Dist.] 2014, pet. ref'd). This standard applies to both direct and circumstantial evidence. *Criff*, 438 S.W.3d at 137. Accordingly, we will uphold the jury's verdict unless a rational factfinder must have had a reasonable doubt as to any essential element. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); *West v. State*, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

A felon commits unlawful possession of a firearm "if he possesses a firearm . . . after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later[.]" Tex. Penal Code § 46.04(a). The statutory elements of this offense, modified by the allegations in the indictment in this case, consist of the following: (1) the defendant (2) having been previously convicted of a felony (3) intentionally or knowingly (4) possessed (5) a firearm (6) before the fifth anniversary of his release from confinement. *See id.* Appellant challenges only the possession element of the offense in the present case.

We analyze the sufficiency of the evidence of possession of a firearm by a felon under the rules adopted for establishing the sufficiency of the evidence in cases

of possession of a controlled substance. *Corpus v. State*, 30 S.W.3d 35, 37-38 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Thus, the State must establish "that appellant knew of the weapon's existence and that he exercised actual care, custody, control, or management over it." *Id.* The State may prove possession through direct or circumstantial evidence, although the evidence must establish that the accused's connection with the weapon was more than fortuitous. *Poindexter v. State*, 153 S.W.3d 402, 405-06 (Tex. Crim. App. 2005).

When, as here, the accused is not in exclusive control of the place the weapon was found, "there must be independent facts and circumstances linking the accused to the contraband." *Corpus*, 30 S.W.3d at 38. Affirmative links to the firearm may circumstantially establish an accused's knowing possession of a firearm including, without limitation: (1) his presence when a search is conducted; (2) whether the firearm was in plain view; (3) whether the firearm was in close proximity to him and he had access to the firearm; (4) whether he had a special connection to the firearm; (5) whether he possessed other contraband when arrested; (6) whether he made incriminating statements when taken into custody; (7) whether he attempted to flee; (8) whether he made furtive gestures; (9) whether he owned or had the right to possess the place where the firearm was found; (10) whether the place where the firearm was found was enclosed; (11) whether conflicting statements on relevant matters were given by the persons involved; and (12) whether his conduct indicated a consciousness of guilt. *See James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd); *Bates v. State*, 155 S.W.3d 212, 216-17 (Tex. App.—Dallas 2004, no pet.); *Corpus*, 30 S.W.3d at 38. The absence of any of these various links does not constitute evidence of innocence to be weighed against the links present, however. *Williams v. State*, 313 S.W.3d 393, 398 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Instead, we measure the sufficiency of the

evidence by looking to the logical force of all of the evidence, rather than the number of links present in a given case. *See id.*

**B. Application**

Appellant contends the affirmative links connecting him to the firearm are "very tenuous." He points out that the firearm was not in his possession, not in a place owned by him, and not in a vehicle driven by him. Instead, he emphasizes that the gun was discovered in "an open public area identified as 'high crime' by a number of the State's witnesses." He also stresses that there was no DNA or fingerprint evidence linking him to the gun. And although he acknowledges that he made inculpatory statements to police officers while in their custody, he urges that these general statements do not link him to the particular firearm found by the K9 unit.

Despite these circumstances that may distance him from the firearm, several other factors present in this case support the jury's finding that appellant possessed the gun. First, the 911 call played to the jury reveals that appellant reportedly carried a firearm. *See Bates v. State*, 155 S.W.3d 212, 217 (Tex. App.—Dallas 2004, no pet.) (explaining that 911 call reporting Bates had a gun was a factor linking Bates to gun's possession). Second, when law enforcement arrived on the scene, appellant fled from them. *See Williams*, 313 S.W.3d at 398 (noting that an attempt to flee from police is a factor linking a defendant to contraband). Third, appellant made furtive movements by "darting" towards the wooded area, where the gun was ultimately recovered. *See Corpus*, 30 S.W.3d at 38 (explaining that "furtive gestures could support an inference that appellant displayed a consciousness of guilt"). Fourth, before "darting" towards the woods, appellant carried a black shirt in his hands. Yet, when taken into custody immediately after making this movement, he no longer carried the black shirt, and the K-9 unit discovered the firearm wrapped

inside a black shirt.[3] From this evidence, jurors reasonably could conclude that appellant discarded both the shirt and the gun when he darted towards the woods. Finally, appellant made several incriminating statements to officers that linked him to the gun. These statements included (1) stating that he was a drug dealer and he would always be armed; (2) apologizing to officers for lying to them when he denied that he had a gun; and (3) telling Sergeant Barnes that he knew he was not supposed to have a gun and that he would "accept" a weapons charge.

Viewing this evidence in the light most favorable to the verdict, we conclude that a rational factfinder could have found beyond a reasonable doubt that appellant possessed the firearm. *See Jackson*, 443 U.S. at 319; *Bates*, 155 S.W.3d at 217; *James*, 264 S.W.3d at 219-20; *Corpus*, 30 S.W.3d at 35; *see also Scott v. State*, No. 09-15-00280-CR, 2016 WL 6518621, at *5 (Tex. App.—Beaumont Nov. 2, 2016, pet. ref'd) (mem. op., not designated for publication) (affirming Scott's conviction for felon in possession of a firearm despite the facts that (1) the firearm was found in tree line "some distance from" Scott's truck, and (2) although witness saw Scott move from his truck to the area where the firearm was located, no one saw Scott actually place the firearm in the tree line).

For the foregoing reasons, we overrule appellant's challenge to the sufficiency of the evidence to support his conviction.

[3] Appellant claims that there was evidence that, at the same moment that appellant was running from the officers, "another man who was never apprehended was also running from the complex in a black t-shirt." As to the other man, Sergeant Barnes testified that she chased this individual until the complainant identified appellant as the suspect. She stated that appellant fled in an "easterly direction," while the other individual ran towards "the west." Sergeant Abbassi similarly testified that appellant fled in a "northeast" direction, while the other individual ran towards the "southeast." Abbassi also confirmed that this unidentified second man was "nowhere around during th[e] pursuit" of appellant.

## Ineffective Assistance of Counsel

In his third issue, appellant asserts he was denied the effective assistance of counsel when his counsel failed to object to the admission of an incorrect prior conviction during the guilt-innocence phase. And in issue four, he contends his counsel was ineffective by agreeing to the amendment of the indictment to accommodate the admission of the wrong prior conviction. We begin our analysis of these issues by identifying the standard of review.

### A. Standard of Review

The United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Under this standard, an appellant must prove that (1) counsel's representation fell below an objective standard of prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 690-94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

An appellant bears the burden to establish both prongs of the *Strickland* test by a preponderance of the evidence, and an appellant's failure to satisfy one prong makes it unnecessary for a court to consider the other prong. *See id.* at 697; *see also Jagaroo v. State*, 180 S.W.3d 793, 797 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Our review of counsel's performance is highly deferential, and we indulge a strong presumption that "counsel's conduct falls within a wide range of reasonabl[y] professional assistance." *Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App.

2013). Counsel's deficiency must be firmly founded in the record; we do not engage in retrospective speculation. *Lopez*, 343 S.W.3d at 142.

## B. Application

Appellant's ineffective assistance complaints stem from his counsel's actions—or inactions—when the State introduced evidence of a conviction from an enhancing paragraph of the indictment during guilt-innocence. Because both of these complaints arise from the same facts, we provide a brief summary of the relevant events.

### 1. *Relevant Facts*

The grand jury indicted appellant for the offense of unlawful possession of a firearm by a felon, with the prior conviction to establish appellant's status as a felon listed as cause number 1205253, possession of a controlled substance with intent to deliver. The indictment also contained two enhancing allegations, alleging that appellant previously committed (1) the felony offense of possession of a controlled substance in cause number 1098089, and (2) the felony offense of assault on a public servant in cause number 1253533.

During the guilt-innocence phase of appellant's trial, the State elicited testimony from its fingerprint expert concerning appellant's conviction for possession of a controlled substance in cause number 1098089, instead of possession of a controlled substance with intent to deliver in cause number 1205253. When the prosecutor realized that she had put on evidence of appellant's conviction for possession, rather than possession with intent to deliver as alleged in the indictment, she asked to approach the bench, and the trial court dismissed the jury.

After the jury left the courtroom, the following colloquy occurred:

[Prosecutor]: At this time the State would like to move to amend the indictment as currently read to change the felon in possession of a firearm paragraph from the conviction for possession with intent to deliver out of the 209th District Court to the possession of a controlled substance out of the 185th District Court since the second one I just mentioned is the one that the jury has heard about. Otherwise, we'd have to proceed on the conviction out of the 209th District Court which means it would be brought to the jury's attention that the defendant has an extraneous offense that they don't need to hear about for purposes of a conviction in this case.

So we want to amend the indictment to read the conviction out of the 185th and not the one out of the 209th.

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[Defense Counsel]: Judge, I would move for a mistrial. As far as argument goes, if you recall, Your Honor, it was even brought up in voir dire when they asked about what the underlying charge is. So everyone was made aware of possession with intent to deliver. So adding this new case in there I believe has tainted the jury, it has resulted under 403 highly prejudicial to my client and so I would respectfully move for a mistrial at this time.

THE COURT: That will be denied.

[Defense Counsel]: As far as the amending the indictment, Your Honor, as we kind of discussed off the record, as far as my thought process goes, Your Honor, I'm okay with amending it at trial and waiving my 10 days. I don't think there's any type of surprise here. They were pretty tightly related as far as what it was. It wasn't like it was a drug case and then a ag [sic] robbery gets added.

In my thinking process, also, Judge, is that actually by amending it, in my opinion the underlying offense is a lot less bad, I guess for lack of a better term or harmful because it's a possession of a controlled substance, although it's third degree.

The other charge was intent to deliver which seeing that he had the evidence of the marijuana and it looks like he was dealing the marijuana. Obviously, we want to kind of gloss that over if we can.

So that's the main reason, just for the record, that I'm okay with amending it.

> THE COURT: And you're waiving your 10 days?
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> [Defense Counsel]: Yes, that's correct.
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> THE COURT: All right. So the indictment will be amended. I'm going to grant the State's motion to amend the indictment and it will be amended. The previous conviction of the defendant that makes him eligible to be felon in possession of a weapon will be amended to match the testimony that was just elicited which was the felony of possession of a controlled substance out of the 185th District Court of Harris County, Texas, on November 29th, 2007, in Cause No. 1098089.
>
> [Defense Counsel]: If I may just very quickly, Your Honor. Another reason why I'm okay with amending it this way and going down this process is that if we were to go down the other way, then what would be required is the State to present yet another packet which would really let the jury know that there was a prior. It would bring, like blatantly bring it to light and I think just trial strategy goes that's not something that I want to do.
>
> I'd much rather the jury go, Hmm, what happened? Okay. No big deal. Then they would hear more evidence of prior offenses.

2. *Failure to object*

Appellant first contends that his trial counsel's failure to object to the admission of evidence of his conviction for possession of a controlled substance from an enhancing paragraph during guilt-innocence "was so outrageous that no competent attorney would have engaged in it." We disagree. "Isolated errors or omissions of counsel do not amount to deficient performance, which is judged by the totality of representation." *Ex parte Bowman*, No. PD-0208-16, —S.W.3d—, 2017 WL 2799976, at *10 (Tex. Crim. App. June 28, 2017). Indeed, had appellant's trial counsel objected to the admission of this evidence, the jury may have been put on notice that appellant had more than one felony conviction. *See Straight v. State*, 515 S.W.3d 553, 573-74 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) ("Although the record is silent on trial counsel's reasons for not objecting to and requesting a limiting instruction as to [testimony concerning an extraneous offense],

a reasonable presumption would be that trial counsel decided that objecting and seeking a limiting instruction would only highlight the testimony."). Finally, as appellant's trial counsel explained, the simple possession offense about which the State elicited testimony was less "harmful" than the possession with intent to deliver offense that was included in the indictment; counsel may have reasonably believed that admission of this offense to establish appellant's status as a felon would be less damning to the jury than admission of the offense included in the indictment. And the State did not attempt to elicit testimony about the other offense during guilt-innocence, so counsel's strategy may have worked to appellant's benefit.

In short, we conclude that appellant has not established that his trial counsel was ineffective for failing to object to testimony concerning this offense. *See, e.g.*, *id.* We overrule appellant's third issue.

3. *Amendment of Indictment*

Next, appellant complains that his counsel was ineffective for agreeing to allow the State to amend the indictment. Again, we disagree.

Article 28.10 of the Texas Code of Criminal Procedure provides a defendant the right to object to an amendment to the indictment after trial on the merits has started. Tex. Code Crim. Proc. art. 28.10(c). This article provides that an indictment "may not be amended over the defendant's objection as to form or substance if the amended indictment . . . charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced." *Id.* If an indictment is amended during trial, the defendant must object to the amendment or the objection is waived. *Id.* art. 28.10(b).

First, appellant has not established that the amended indictment in this case charged him with an additional or different offense, nor has he explained how his

substantial rights were prejudiced by the amendment. The indictment, as amended, charged appellant with the same offense—unlawful possession of a firearm by a felon—as the original indictment. *See* Tex. Penal Code § 46.04(a); *see also Flowers v. State*, 815 S.W.2d 724, 728 (Tex. Crim. App. 1991) (per curiam) (explaining that "an additional or different offense" under article 28.10(c) means a different statutory offense). Further, as appellant's counsel emphasized to the trial court, the jury would likely perceive possession of a controlled substance as a less serious offense than possession of a controlled substance with intent to deliver. Thus, we cannot see how this substitution prejudiced appellant's substantial rights. *E.g.*, *Lee v. State*, No. 05-02-00508-CR, 2003 WL 21212822, at *5-6 (Tex. App.—Dallas May 27, 2003, pet. ref'd, untimely filed) (mem. op., not designated for publication) (holding that trial counsel's failure to object to amendment of indictment did not amount to ineffective assistance of counsel when both original and amended indictments charged defendant with identical offense and defendant was aware of all facts surrounding incident at issue).

Nonetheless, as evidenced from the excerpt above, when the State moved to amend the indictment, appellant's trial counsel initially sought a mistrial. The trial court denied appellant's motion for mistrial, and appellant does not complain that the trial court erred in denying the mistrial. Once the trial court denied appellant's motion for mistrial, appellant's counsel agreed to the amendment. And we need not speculate about counsel's reasons for agreeing to the trial amendment: counsel explained that he could either agree to the amendment of the indictment or the State would put on testimony concerning another, potentially more harmful, offense to establish appellant's status as a felon. Keeping another extraneous offense from the jury during the guilt-innocence phase is a rational legal strategy and does not meet the *Strickland* test for ineffective assistance of counsel.

Finally, as a reviewing court, we look to the totality of the representation and to the circumstances of the case, not to isolated instances in the record reflecting errors of omission or commission. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). In this case, we note that appellant's trial counsel made numerous objections, took witnesses on voir dire, and cross-examined witnesses. Additionally, although the State prosecuted appellant both for the instant offense and for aggravated assault in this proceeding, trial counsel successfully kept from the jury police officer testimony concerning statements by appellant's girlfriend to the officer about the alleged assault.[4] In fact, appellant's trial counsel obtained a directed verdict on the charge of aggravated assault.

Under these circumstances, appellant has failed to establish by a preponderance of the evidence that his counsel was ineffective for the reasons he advances on appeal, and we overrule his fourth issue.

**Use of Prior Conviction**

In his first issue, appellant contends the trial court erred by allowing a single prior conviction to serve as both an element of the charged offense and a punishment enhancement. We agree. "The use of a prior conviction to prove an essential element of an offense bars the subsequent use of that same prior conviction in the same indictment for enhancement purposes." *Wisdom v. State*, 708 S.W.2d 840, 845 (Tex. Crim. App. 1986); *see also Hernandez v. State*, 929 S.W.2d 11, 12 (Tex. Crim. App. 1996) ("The State is not permitted to use the same prior conviction more than once in the same prosecution."); *Musgrove v. State*, 425 S.W.3d 601, 614-15 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

[4] Appellant's girlfriend, the complainant in the aggravated assault charge, would not cooperate with the District Attorney's office and refused to appear at appellant's trial to testify against him.

As discussed above, the indictment was amended to reflect cause number 1098089, possession of a controlled substance, as the felony conviction establishing appellant's status as a felon. But this same offense remained as an enhancing allegation, and the trial court sentenced appellant under the habitual offender statute to thirty years' confinement.[5] Appellant's third-degree felony conviction, enhanced by one prior felony conviction, was subject to a maximum sentence of twenty years. *See* Tex. Penal Code § 12.42(a) (a third degree felony enhanced by one prior felony conviction carries the punishment range of a second-degree felony, i.e., two to twenty years' confinement); *see also Musgrove*, 425 S.W.3d at 615 ("A sentence outside the prescribed punishment range is void and illegal.").

In short, the State improperly relied on the same prior conviction as both an element of the offense and to enhance appellant's punishment range, and the trial court sentenced appellant outside the permissible range of punishment. *See Wisdom*, 708 S.W.2d at 845; *Musgrove*, 425 S.W.3d at 614-15. When such reversible error occurs during the punishment phase, the appellant is entitled to a new trial on punishment. *See* Tex. Code Crim. Proc. art. 44.29(b); *see also Musgrove*, 425 S.W.3d at 615.

Accordingly, we sustain appellant's first issue.[6]

## Conclusion

We have overruled appellant's challenge to the sufficiency of the evidence and two of his three claims of ineffective assistance of counsel. But we have

[5] A defendant who has been previously been convicted of two felony offenses (other than a state jail felony) is subject to a range of punishment for the third felony conviction of twenty-five to ninety-nine years. Tex. Penal Code § 12.42(d).

[6] Appellant argues in his fifth issue that his counsel was ineffective for failing to object to the dual use of his prior conviction in cause number 1098089. Because we reverse and remand for a new trial on punishment, we need not consider this issue as it would afford appellant no further relief. *See* Tex. Code Crim. Proc. art. 44.29(b).

sustained appellant's issue concerning the enhancement of his punishment and, accordingly, do not reach appellant's third claim of ineffective assistance of counsel. Because the error in this case relates to punishment only, we reverse and remand for a new punishment determination. *See* Tex. Code Crim. Proc. art. 44.29(b).

/s/ Kevin Jewell
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.
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