Affirmed in Part and Reversed and Remanded in Part and Memorandum Opinion filed August 17, 2023.

In The

Fourteenth Court of Appeals

NO. 14-20-00243-CR

EMEKWANEM IBE BIOSAH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 18-CR-1912

MEMORANDUM OPINION

Appellant Emekwanem Ibe Biosah pleaded guilty to fraudulent use of identifying information, five or more but less than ten items, a third degree felony, and was sentenced to two years' confinement. *See* Tex. Penal Code Ann. § 32.51(b)(1), (c)(2). The State and appellant now agree that the evidence admitted in the punishment hearing shows he used fewer than five items, for which

punishment should be assessed as a state jail felony.[1] *See id.* § 32.51(c)(1). We affirm the portion of the judgment concerning appellant's guilt but reverse the portion concerning appellant's punishment and remand for a new punishment hearing.

I. BACKGROUND

A grand jury indicted appellant for fraudulent use or possession of more than five but less than ten items of identifying information. *See id.* § 32.51(b)(1), (c)(2). Appellant pleaded guilty to the third-degree felony, waived the right to appeal his guilt or innocence, and proceeded to a hearing before the trial court for determination of punishment.[2] After hearing the evidence, the trial court assessed punishment at two years' confinement in the Texas Department of Criminal Justice, which is the minimum sentence for a third-degree felony. *See id.* § 12.34(a).

At the punishment hearing, the evidence identified three victims by name who each held investment accounts at Merrill Lynch. Appellant had used their three different account numbers, which a friend encoded onto credit cards embossed with appellant's name, over 175 times at numerous stores in Texas over several months. Many of appellant's near-daily charges with the three men's account numbers had occurred at fifteen Buc-ee's convenience stores in nine Texas counties.

Because a grand jury in Galveston County, Texas indicted appellant, the State focused on appellant's fraudulent charges at Buc-ee's #33, a convenience

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[1] Appellant's first appellate counsel filed an *Anders v. California* brief, 386 U.S. 738 (1967), in which counsel concluded there were no arguable issues for appeal. This Court disagreed, abated the appeal, and remanded to the trial court for appointment of other counsel.

[2] Appellant's guilty plea was not the result of a plea bargain with the State.

store in Texas City, Galveston County, Texas. At Buc-ee's #33, appellant made seventeen purchases with the three men's account numbers. A loss prevention manager for Buc-ee's #33 located eight receipts from these seventeen fraudulent charges, generally for cartons of cigarettes, and at least seven corresponding security videos of appellant at the checkout counter.

Finally, this loss prevention manager also provided three other account numbers that had been used fraudulently at Buc-ee's #33 in the same period as appellant's other fraudulent purchases. However, in his testimony, the loss prevention manager did not confirm whether appellant had used these three additional numbers. And although a certified fraud examiner also testified during the punishment hearing, her testimony did not address these three additional account numbers. The record is silent about the account holders' names, the associated banks, corresponding receipts at Buc-ee's #33, and whether it was appellant who used or possessed these three additional account numbers.

Thus, the evidence presented at the punishment hearing showed appellant fraudulently used three items of identifying information, not five or more but less than ten items. The difference in the number of items corresponds to the range of punishment which could be assessed against appellant: use of fewer than five items of identifying information corresponds to punishment for a state jail felony, *see id.* § 32.51(c)(1), punishable by confinement from 180 days to two years. *Id*. § 12.35(a). Use of five or more but less than ten items is a third-degree felony, *id*. §32.51(c)(2), punishable by confinement from two years to ten years. *Id*. § 12.34(a).

II. Analysis

In two issues, appellant contends that (1) there is insufficient evidence he used five or more items of identifying information; his plea was involuntary; his

right to due process was violated; and he should thus be acquitted; or (2) this court should reform the judgment to reflect that he was guilty only of a state jail felony and remand for a new punishment hearing to assess punishment as a state jail felony.

A. Insufficiency of the Evidence

In his first issue, appellant contends that the evidence was insufficient to support his conviction. For a non-capital felony guilty plea, we review sufficiency of the evidence under Article 1.15 of the Texas Code of Criminal Procedure. Article 1.15 requires the State to "introduce evidence into the record showing the guilt of the defendant . . . and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same." Tex. Code Crim. Proc. Ann. art. 1.15; *see Breaux v. State*, 16 S.W.3d 854, 855–56 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Thus, the State is not required to prove the defendant's guilt beyond a reasonable doubt after a guilty plea. *See Staggs v. State*, 314 S.W.3d 155, 159 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Instead, the State is simply required to introduce supporting evidence that "embrace[s] every essential element of the offense charged." *Stone v. State*, 919 S.W.2d 424, 427 (Tex. Crim. App. 1996).

The elements of fraudulent use or possession of identifying information are: (1) obtaining, possessing, transferring or using an item of another person's identifying information; (2) without the person's consent; and (3) with the intent to harm or defraud. *See* Tex. Pen. Code Ann. § 32.51(b)(1); *Sanchez v. State*, 536 S.W.3d 919, 921 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Grimm v. State*, 496 S.W.3d 817, 822 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "[T]he phrase 'item of identifying information' refers to any single piece of personal, identifying information enumerated in the definition of 'identifying information'

that alone or in conjunction with other information identifies a person . . . ." *Cortez v. State*, 469 S.W.3d 593, 602 (Tex. Crim. App. 2015). The definition of identifying information includes "unique electronic identification number, address, routing code, or financial institution account number." *See* Tex. Pen. Code Ann. § 32.51(a)(1)(C). The statute elevates the range of punishment depending on the number of items of identifying information fraudulently used or possessed, making the use or possession of one to four items a state jail felony and the use or possession of five to nine items a third-degree felony. *See id.* § 32.51(c)(1)–(2); *Cortez*, 469 S.W.3d at 599.

Appellant signed a judicial confession and stipulation that reads: "I . . . confess my GUILT to having committed each and every element of the offense alleged in the indictment . . . and I agree and stipulate that the facts contained in the indictment . . . are true and correct and constitute the evidence in this case." Appellant's judicial confession and stipulation were admitted in evidence. A judicial confession or stipulation of evidence is sufficient to sustain a conviction based on a guilty plea and satisfies Article 1.15 as long as it embraces every essential element of the charged offense. *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009).

Additionally, the evidence at the punishment hearing includes the testimony and investigative documents from Buc-ee's loss prevention manager who identified appellant as the subject of his fraud investigation at Buc-ee's #33. The loss prevention manager's investigation included a "chargeback report" documenting two account numbers fraudulently used at Buc-ee's #33 by appellant and a "transaction journal" (akin to a receipt) showing a third account number. The evidence includes Merrill Lynch account statements for these three account numbers, which identify the account owners' names and cumulatively show

seventeen fraudulent charges at Buc-ee's #33.[3] Eight transaction journals detail the products purchased by appellant at Buc-ee's #33, the dates of purchase, and the applicable fraudulently used account number. In addition to this evidence, the trial court admitted at least seven corresponding security videos of appellant at the checkout counter purchasing these items. Other videos show appellant in the parking lot leaving with his purchases. Finally, appellant also testified that an acquaintance had encoded stolen account numbers onto appellant's existing credit cards, which appellant then used. Appellant testified that he did not know the persons whose account numbers he used, but he again admitted to his guilt.

Cumulatively, there is proof of each of the essential elements of fraudulent use or possession of identifying information. *See Grimm*, 496 S.W.3d at 822–24 (addressing cumulative force of evidence sufficient to prove possession of identifying information). We conclude there is sufficient evidence of Appellant's guilt under section 32.51(b)(1) of the Texas Penal Code.

B. Involuntary Plea & Due Process

Appellant nonetheless argues in his first issue that his guilty plea was involuntary. He avers that no one who understood the meaning of "item" of identifying information would have pleaded guilty to using more than five items when the State had evidence of fewer than five. He states that he and two experienced attorneys conflated the number of items he used with the number of times he used them. He thus reasons that reliance on his plea violates due process.

The Court of Criminal Appeals has not distilled a single standard to address cases in which a defendant has been similarly erroneously sentenced after a guilty

[3] An account belonging to victim Maund showed eight charges at Buc-ee's #33; an account belonging to victim Jakubowski showed eight such charges; and an account belonging to victim Zambrano showed one such charge.

plea. Some cases have been reviewed as "illegal sentences." *See*, *e.g.*, *Ex parte Rich*, 194 S.W.3d 508, 511-12 (Tex. Crim. App. 2006) (addressing an improper enhancement using a misdemeanor offense not a felony). Others have been determined to be the result of an involuntary plea, *see*, *e.g.*, *Ex parte Mable*, 443 S.W.3d 129, 131 (Tex. Crim. App. 2014) (addressing possession of a controlled substance that later tested as no illicit substance), or as a violation of the right to due process. *See*, *e.g.*, *State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010) (addressing an improper enhancement using a not-yet-final DWI, though defendant pleaded true to it). In some instances, the Court of Criminal Appeals has determined that a guilty plea is not assailable on due process grounds if the defendant has sufficient awareness of the impact of his plea though not complete knowledge of the prosecution's case. *See Ex parte Palmberg*, 491 S.W.3d 804, 8078 (Tex. Crim. App. 2016) (addressing applicant's guilty plea for possession of a controlled substance after he later learned confirmatory testing could not be conducted because the substance had been almost entirely consumed by field testing).

We address appellant's claims in light of these varying approaches. We first determine whether appellant's sentence of two years' confinement was an illegal sentence. An illegal sentence is one that is not authorized by law. *Ex parte Pue*, 552 S.W.3d 226, 228 (Tex. Crim. App. 2018) (addressing improper enhancement as a habitual offender, where one of two out-of-state felonies had been probated and was thus not a final conviction eligible to enhance applicant's sentence). A sentence that is outside the maximum or minimum range of punishment is unauthorized by law. *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). Because two years' confinement falls within the authorized range of punishment

for either a state jail felony[4] (for possession of fewer than five items of identifying information) or a third-degree felony[5] (for possession of five or more but less than ten items), we conclude that appellant's sentence is not an illegal sentence.

We next address whether appellant's plea was involuntary. Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Mable*, 443 S.W.3d at 131. To that end, appellant urges that his plea occurred due to a fundamental misunderstanding of the law, citing *Ex parte Hicks*, 640 S.W.3d 232 (Tex. Crim. App. 2022). In *Hicks*, the applicant pleaded guilty to attempted forgery of a $100 bill that was, years later, shown to be genuine. *Id*. at 233. All parties in *Hicks* believed at the time of his plea that the $100 bill was fake. *Id*. at 234. The applicant was under a misapprehension about the true nature of the item he possessed, was thus insufficiently aware of a fact that was crucial to the case, and was allowed to withdraw his plea. *Id*. The State counters that both *Mable* and *Hicks* differ from appellant's case because appellant was mistaken about his range of punishment, not whether he had committed an offense at all. We agree. The evidence is replete with confirmation—including appellant's testimony—that he used multiple account numbers that he knew belonged to strangers to purchase cartons of cigarettes at Buc-ee's #33.

The State argues that *Palmberg* is more applicable to this case. In *Palmberg*, the applicant pleaded guilty to possession of cocaine, but later learned that field testing of the suspected cocaine had left too little for confirmatory testing in a laboratory. 491 S.W.3d at 806. He argued that he would not have pleaded guilty if he had known there was no more of the substance to test. *Id*. at 806–07. The Court

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[4] Tex. Penal Code Ann. § 12.35(a).

[5] Tex. Penal Code Ann. § 12.34(a).

of Criminal Appeals in *Palmberg* held that a plea is not involuntary just because a defendant pleaded guilty under the mistaken belief that specific evidence would be available for use against him at trial. *Id.* at 808. The court explained that sufficient awareness to support a guilty plea does not require complete knowledge of the prosecution's case. *Id*. at 807. A guilty plea does not violate due process when the defendant enters it misapprehending the nature or strength of the State's case against him, including misestimating the likely penalty. *Id*. (citing *United States v. Ruiz*, 536 U.S. 622, 630–31 (2002)).

In *Palmberg*, the court noted there could be any number of situations in which evidence the defendant anticipated is not actually admitted at trial. *Id*. at 809. Here, the Buc-ee's loss protection manager's investigation file, chargeback report, and transaction journals cumulatively list six account numbers used fraudulently at the store. The State provided this evidence to appellant eleven months before his trial date. The State also provided a potential witness list to appellant a year before his trial date, which included the names of nine non-law enforcement witnesses, including the three victims named in the punishment hearing. Appellant may have anticipated that the State could have easily proven his use of all six items of identifying information found in Buc-ee's #33's file, not just three.[6] *See Brady v. United States*, 397 U.S. 742, 749 (1970) (stating "the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family"). There is no indication in the record why the State did not "prove up" all six items at the punishment hearing. Regardless, the record does not demonstrate that appellant mistakenly believed he was guilty. *See Palmberg*, 491 S.W.3d at 811.

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[6] The record does not reflect that any of the six account numbers in the State's file were intentional or inadvertent false evidence. *See Ex parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006).

The United States Supreme Court has also noted strategic reasons for which a defendant may voluntarily plead guilty, including the possibility of a more lenient sentence. *Brady*, 397 U.S. at 752 (discussing voluntary pleas where the judge may be more lenient than a jury or more lenient with those who plead guilty rather than go to trial). In this case, the State plainly revealed to appellant over the course of a year that it intended to introduce evidence of his prior convictions. For instance, the State filed a notice of intent to introduce prior offenses into evidence; included fingerprint experts on its potential witness list (to verify fingerprints cards from prior offenses); filed a motion to obtain an identity history and fingerprints with dates of arrest from the Federal Bureau of Investigation ("FBI"); and obtained a later trial setting because it was still verifying a federal judgment. On the day appellant pleaded guilty—the day of the pre-trial discovery conference—the State filed a "Discovery Compliance Statement" indicating it had provided the recently-received FBI Identification Record to appellant.

Thus, appellant may have reasoned that he would receive a lengthier sentence from a jury than the trial court, given his history of convictions and the lengths taken by the State to obtain it in admissible form. *Id*. at 756-57 (stating "[o]ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted"). At the punishment hearing, the State focused on appellant's prior convictions. The trial court admitted the FBI record into evidence, as well as judgments from a United States district court for possession of stolen mail and aggravated identity theft. The State elicited testimony from a crime scene investigator who confirmed that appellant's fingerprints matched the fingerprint cards from appellant's prior convictions. The State also elicited testimony from appellant that he had been

convicted of first-degree forgery in Gwinnet County, Georgia in 1998 and was sentenced to three years' imprisonment. In its closing argument, the State emphasized the sequence of appellant's prior fraud-related convictions and subsequent offenses, and the State asked the trial court to assess ten years' imprisonment. Despite the evidence and the State's argument, the trial court assessed punishment at two years' imprisonment, which is the minimum for a third-degree felony. The trial court also marked "N/A" for enhancement of the punishment.[7]

We conclude that appellant was sufficiently aware of the relevant circumstances to enter an intelligent and voluntary plea of guilty. *See Palmberg*, 491 S.W.3d at 814. We disagree that his plea was involuntary or a violation of his right to due process as set forth in *Mable* or *Wilson*. We overrule appellant's first issue.

C. Sentencing Error

In his second issue, appellant contends that he was erroneously sentenced for

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[7] The Texas Penal Code provides penalties for repeat felony offenders. *See* Tex. Penal Code Ann. §§ 12.42, 12.425. A defendant with two prior final felony convictions (where the second offense occurred after the first conviction was final) on conviction of a felony offense other than a state jail felony under § 12.35(a), may have punishment enhanced to a third-degree felony, and sentenced to imprisonment for twenty-five years to ninety-nine years or life. *See id.* § 12.42(d). Similarly, on conviction of a state jail felony, a defendant such as appellant with two prior final felony convictions other than state jail felonies under § 12.35(a) (where the second offense occurred after the first conviction was final) may have punishment enhanced to a second-degree felony, *see id.* § 12.425(b), punishable by imprisonment for two to twenty years' imprisonment. *Id.* § 12.33(a).

An out-of-state, final felony conviction can be used to enhance a sentence imposed in Texas. *See id.* § 12.41(1); *Pue*, 552 S.W.3d at 231; *Davis v. State*, 645 S.W.2d 288, 292 (Tex. Crim. App. 1983). Appellant's conviction and three-year sentence in Georgia for first-degree forgery was a felony. *See* Ga. Code Ann. 16-9-2 (2012); *McKie v. State*, 812 S.E.2d 353, 355 n.1 (Ga. App. 2018). Appellant's final federal conviction and four-year sentence for possession of stolen mail and aggravated identity theft is also considered a felony for enhancement purposes. *See United States v. Banks*, 624 F.3d 261 (5th Cir. 2010) (addressing appellant's appeal of those convictions, under his pseudonym).

a third-degree felony instead of a state jail felony, based on the number of items of identifying information he fraudulently used. Appellant proposes that because the evidence showed he used fewer than five items, he is guilty of a lesser-included offense. *See Cortez v. State*, 469 S.W.3d 593, 596 (Tex. Crim. App. 2015) (referring to possession of fewer items of identifying information as a "lesser-included offense"). The State agrees that the parties and the trial court mistakenly believed that appellant was to be sentenced for a third-degree felony, not a state jail felony.[8]

Absent an express waiver, a criminal defendant has the right to have his punishment assessed in light of the correct range of punishment. *Grado v. State*, 445 S.W.3d 736, 741–43 (Tex. Crim. App. 2014); *Van Flowers*, 629 S.W.3d 707, 712 (Tex. App.—Houston [1st Dist.] 2021, no pet.). When presented with conflicting evidence after a guilty plea, the trial court may find the defendant guilty, not guilty, or guilty of a lesser offense, as the facts require. *See Thomas v. State*, 599 S.W.2d 823, 824 (Tex. Crim. App. [Panel Op.] 1980); *Rivera v. State*, 123 S.W.3d 21, 33 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); *see also Aldrich v. State*, 53 S.W.3d 460, 467 (Tex. App.—Dallas 2001), *aff'd*, 104 S.W.3d 890 (Tex. Crim. App. 2003) (holding trial court should consider all evidence submitted, and then find defendant guilty as charged, guilty of lesser-included offense, or not guilty, as required by evidence). A trial court errs if it fails to assess punishment using the correct statute and range of punishment, and a defendant can raise this error for the first time on appeal. *See Grado*, 445 S.W.3d at 741–43.

"[A] judge has an independent duty both to identify the correct statute under

[8] We give due consideration to the State's confession of error, though the confession is not dispositive. *See Saldano v. State*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002); *Van Flowers v. State*, 629 S.W.3d 707, 710 (Tex. App.—Houston [1st Dist.] 2021, no pet.). We must independently assess the appellant's issue for error. *See Neale v. State*, 525 S.W.3d 800, 810 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

which a defendant is to be sentenced and the range of punishment it carries and to consider the entire range of punishment in sentencing a defendant." *Id*. at 741. After a guilty plea or plea of true, punishment is erroneous if the trial court uses the wrong classification, *see State v. Rowan*, 629 S.W.2d 116, 117–18 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (applying punishment for a Class A misdemeanor rather than Class B), wrong penalty group, *Grado*, 445 S.W.3d at 738, or wrong range of punishment, *Van Flowers*, 629 S.W.3d at 712 (incorrectly concluding the statutory minimum was fifteen years' imprisonment not ten years'). As *Grado*, *Van Flowers*, and *Rowan* reflect, such punishment is error even if the sentence falls within the range of punishment authorized for the correct classification or penalty group.

In *Grado*, a defendant pleaded true to violations of the conditions of his probation, after having earlier pleaded guilty to possession of 400 grams or more of amphetamine. 445 S.W.3d at 737. The court and the parties believed defendant had possessed a Penalty Group I substance that required a minimum of ten years' confinement. *Id*. at 738. However, the defendant had possessed a Penalty Group II substance, making the correct sentencing range five to ninety-nine years' confinement. *Id*. Even though the trial court had "conscientiously" considered the range of punishment and assessed a punishment that fell within the authorized range of punishment for both Penalty Group I and II, the Court of Criminal Appeals concluded that the trial court erred because the judge had not identified the correct statute and considered the entire range of punishment it provided. *Id*. at 741. Similarly, the trial court here did not realize that the evidence at the punishment hearing proved fewer than five items of identifying information, a state jail felony punishable by 180 days to two years' confinement. As in *Grado*, the trial court here also assessed a punishment that is allowable for both a third-degree

and a state jail felony, but erroneously considered the wrong range of punishment. We thus conclude that appellant and the State are correct that the trial court erred in assessment of punishment.

D. Disposition

Having concluded there was error in the punishment hearing, we next consider the appropriate disposition. Appellant asks this Court to modify the judgment to reflect conviction for a state jail felony and to remand for assessment of punishment between 180 days and two years' incarceration. The State argues that we should remand to the trial court for a new punishment hearing.

We are authorized to modify a trial court's judgment and affirm it as modified. Tex. R. App. P. 43.2(b). Consistent with this authority, courts of appeals have modified judgments to correct various errors, *see Van Flowers*, 629 S.W.3d at 711–12 (setting forth various permissible modifications), including the incorrect degree of the felony for which a defendant has been convicted. *See Castillo v. State*, 404 S.W.3d 557, 564 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (addressing judgment that incorrectly stated felony escape was a second-degree felony and failing to include trial court's oral pronouncement that enhancements were true). In order to modify the judgment, the record must supply us with the information necessary to show both that a modification is warranted and that the particular modification is warranted. *Van Flowers*, 629 S.W.3d at 712.

In this case, when pronouncing its judgment, the trial court stated, "I did assess your punishment within the range of punishment, which was two to ten, and I gave you the minimum that I could give you in that respect." The record, however, does not show that the trial court intended to assess punishment at the statutory minimum term of imprisonment no matter what the minimum happened to be. *Id.* at 713. Further, the trial court considered the findings of a pre-sentence

report before she assessed punishment. *See* Tex. Code of Crim. Proc. Ann. art. 37.07, § 3(d). The pre-sentence report was not admitted into evidence; it is not part of the appellate record; and the record is silent about what contents the trial court considered persuasive or not. The trial court also did not make a finding on the enhancements sought by the State.[9] The record is again silent about the trial court's reasoning. Unless the trial court explicitly states its reasoning on the record, we do not know the basis for its punishment decision nor what it would have decided if it had realized the law permitted a different punishment. *See Smith v. State*, 286 S.W.3d 333, 334 (Tex. Crim. App. 2009); *Van Flowers*, 629 S.W.3d at 713. On the record before us, we may not modify the trial court's punishment as sought by appellant. *See Van Flowers*, 629 S.W.3d at 714.

In cases where a defendant enters a plea of guilty or nolo contendere without the benefit of a plea bargain agreement, a court of appeals may remand the case for a new hearing on punishment if it finds trial court error solely in the assessment of punishment. *See* Tex. Code Crim. Proc. Ann. art. 44.29(b); *Boone v. State*, 60 S.W.3d 231, 235 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (citing *Levy v. State*, 818 S.W.2d 801, 802–03 (Tex. Crim. App. 1991)). Such error occurred in this case. Accordingly, we reverse the punishment assessed by the trial court and remand this case to the trial court for a new hearing on punishment.

III. CONCLUSION

Having found sufficient evidence of appellant's guilt and that his guilty plea was not involuntary or a violation of his right to due process, we affirm the trial court's judgment as to his conviction. Having found error in the punishment

[9] As long as an enhancement is not barred by other considerations (*e.g.*, prosecutorial vindictiveness), the State is free to use a prior conviction for enhancement if proper notice of its intent to do so is conveyed with respect to the new punishment hearing. *McNatt v. State*, 188 S.W.3d 198, 204 (Tex. Crim. App. 2006).

hearing, we reverse the trial court's judgment as to appellant's punishment and remand the cause to the trial court for a new punishment hearing consistent with this opinion.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Wilson, and "Meg" Poissant.

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