In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-16-00290-CR
07-16-00291-CR
07-16-00292-CR

TOBY JAY MAYES, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Randall County, Texas
Trial Court No. 26,586-B, Counts I – III; Honorable John B. Board, Presiding

November 28, 2017

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellant, Toby Jay Mayes, appeals his convictions for two counts of sexual assault[1] and one count of unlawful possession of a firearm by a felon.[2] Each of the offenses was enhanced by proof of two prior felony convictions.[3] The jury that found

[1] TEX. PENAL CODE ANN. § 22.011 (West 2011).

[2] *Id*. § 46.04 (West 2011).

[3] *Id*. § 12.42(d) (West Supp. 2016).

appellant guilty also assessed life sentences for each of the offenses. We will reverse in part, reform the trial court's judgments, and affirm as reformed.

Factual and Procedural Background

The complainant in this case was a twenty-three year old male at the time of the offense. Although the complainant is an adult, he is mentally slow and still lived at home with his parents because he was unable to provide for himself. The complainant obtained a "middle school level" of education.

Appellant and the complainant became acquainted through contact at the bicycle store at which appellant worked. Through this relationship, appellant asked the complainant to come to appellant's residence and help him install a satellite dish. The complainant agreed and, on June 21, 2015, rode his bicycle to appellant's residence. However, when the complainant arrived, the satellite dish had already been installed.

Appellant invited the complainant into his home. During an ensuing conversation, appellant asked the complainant if he could trust him. When the complainant said that he could, appellant retrieved a loaded gun and a box of ammunition from a cubbyhole attached to the outside of appellant's trailer. Appellant offered to let the complainant hold the gun but, before handing it to him, appellant first cleared the chamber and removed the magazine. The complainant noted that the bullets removed from the gun were hollow-point bullets. Appellant offered to let the complainant fire the gun into a nearby lake but the complainant declined because he "didn't think it was a good idea." Appellant took the gun from the complainant and returned the gun and ammunition to the location outside the home. When appellant

reentered the home, he told the complainant not to tell anyone about the gun because appellant "could go to prison for having it."

Appellant and the complainant then watched some movies. During the movies, appellant asked the complainant to spend the night. The complainant agreed due to his concern about getting lost in the dark riding his bike home. It was agreed that the complainant would sleep on the floor.

Toward the end of the movies, appellant asked the complainant to come over to where appellant was sitting. When the complainant did so, appellant asked him to unbuckle his pants. The complainant refused. Appellant then pulled down the complainant's pants and began stroking his penis. Appellant put the complainant's penis in his mouth. The complainant was in shock and did not know what was happening because he had never had sexual relations prior to this incident. The complainant told appellant to stop but did not push appellant away. After some time, appellant asked the complainant to turn around. When the complainant refused, appellant forced the complainant to bend over the couch. Appellant then applied petroleum jelly to his finger and inserted his finger into the complainant's anus. Appellant reassured the complainant by telling him to "be a good boy" and "that's a good boy." Subsequently, appellant inserted his penis into the complainant's anus and "began to thrust." After this incident ended, the complainant put his clothes back on while the naked appellant fell asleep on the couch. The complainant laid on the floor. He did not attempt to leave because he was afraid that appellant "would try and hurt me" with the gun.

The next morning, the complainant told appellant that his mother had called and he needed to go home. As he was riding toward his home, the complainant called his mother and told her that he had been sexually assaulted. The complainant was very upset and asked his mother to call the police. When the complainant arrived home, the police were called and the complainant was taken to the hospital to have a sexual assault examination performed. The responding officer, Sergeant Cole, testified that, within a few minutes of listening to the complainant, he could tell that the complainant seemed a little slow, like he had suffered a head injury. The complainant told the sexual assault nurse examiner about the assault and stated that he was afraid during the assault because appellant had showed the complainant the gun.

Appellant was indicted for two counts of sexual assault and one count of unlawful possession of a firearm by a felon. After hearing the evidence, the jury found appellant guilty on all three counts. The jury also found that appellant used or exhibited a deadly weapon during the commission of the sexual assaults. After hearing punishment evidence, the jury found that appellant had been previously convicted of two properly sequenced felony offenses and sentenced him to life imprisonment for all three offenses. It is from the resulting judgments that appellant appeals.

By his appeal, appellant presents eight issues. By his first issue, appellant contends that the indictments in these cases were never presented to the trial court and, therefore, the trial court never acquired jurisdiction over his cases. Appellant's second issue presents the contention that equal protection is violated if the State is not required to verify presentment of State-prepared indictments while defendants are required to provide far more verification of defendant-prepared motions for new trial. By

his third issue, appellant contends that the evidence is insufficient to support the jury's determination that appellant used or exhibited a deadly weapon during the commission of the offenses. By his fourth and fifth issues, appellant contends that the evidence is insufficient to establish that the complainant was unable to resist appellant's advances, physically or due to a mental disease or defect, and that appellant knew of such inability at the time of the sexual assaults. Appellant's sixth issue contends that the punishment charge erroneously indicated that appellant had been convicted of aggravated sexual assault, which caused appellant egregious harm. By his seventh issue, appellant contends that the judgments for the sexual assault convictions should be reformed to reflect that appellant was convicted of sexual assault rather than aggravated sexual assault. Finally, by his eighth issue, appellant contends that the evidence is insufficient to establish that appellant used or exhibited a deadly weapon regarding the unlawful possession of a firearm by a felon conviction.

Indictment

By his first issue, appellant contends that the record reflects that the indictment in this case was merely filed rather than presented to the trial court. As such, he contends that jurisdiction was never vested in the trial court.

When an indictment is presented to a court by a grand jury, it vests the court with jurisdiction over the cause. TEX. CONST. art. V, § 12(b). However, if the defendant fails to object to a defect, error, or irregularity of form or substance in the indictment before the commencement of trial, he waives the right to complain about that defect, error, or irregularity on appeal. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (West 2005).

In the present case, the record reflects no objection to the indictment raised by appellant at any time prior to appeal. As such, appellant has waived his objection regarding whether the indictment was presented to the trial court.[4]

The Texas Court of Criminal Appeals, when confronted with a substantially similar indictment and argument that the indictment was not presented, concluded that, as the indictment stated that it was presented and was in the proper form, presentment was sufficiently established. *Casey v. State*, 414 S.W.2d 657, 658 (Tex. Crim. App. 1967). Moreover, we must accept the statement that the indictment was presented to the trial court unless the record contains direct evidence that it was not. *See Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985) (op. on reh'g) (the presumption of regularity created by recitals in a judgment can only be overcome by affirmative proof of error). More recently, the Texas Court of Criminal Appeals has stated that an original file stamp of the district clerk's office on a signed indictment is "strong evidence that [the] returned indictment was 'presented' to the court clerk within the meaning of Article 20.21 [addressing when an indictment has been presented]." *State v. Dotson*, 224 S.W.3d 199, 204 (Tex. Crim. App. 2007). In the present case, the indictment was file stamped by the district clerk on April 6, 2016. Acknowledging that appellant disagrees with the reasoning contained within these cases, we are duty bound to follow the precedent of the Texas Court of Criminal Appeals.

[4] We are aware that appellant presents this issue as a challenge to the trial court's jurisdiction to hear this case, which requires no objection at trial. However, we view appellant's issue to challenge a defect or irregularity of form regarding the indictment, which can be expressly waived if not raised before the trial commences. TEX. CODE CRIM. PROC. ANN. art. 1.14(b). Absent ambiguity or absurd results that the Legislature could not have intended, this provision's plain language must be implemented. *Boston v. State*, 410 S.W.3d 321, 325 (Tex. Crim. App. 2013).

While appellant presents a compelling case in favor of requiring verifiable presentment of indictments, the Legislature has expressly provided that a defendant's failure to call a defect of the indictment, such as a lack of verifiable presentment, to the attention of the trial court waives the defect on appeal. As an intermediate appellate court, we are bound to follow the law enacted by the Legislature as interpreted by decisions of the Texas Court of Criminal Appeals. *State v. Collazo*, 264 S.W.3d 121, 127 n.4 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

Equal Protection

By his second issue, appellant contends that it is a denial of equal protection if the law accepts unverified presentment of State-prepared indictments while requiring far more verification of defendant-prepared motions for new trial.

Generally, constitutional challenges are forfeited by failing to object before the trial court. *Curry v. State*, 910 S.W.2d 490, 496 & n.2 (Tex. Crim. App. 1995). A challenge to the facial constitutionality of a statute must be made before the trial court or it is forfeited. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009).

In the present case, appellant never challenged the constitutionality of the process of presenting an indictment versus the process of presenting a motion for new trial. Appellant contends that, if the Court disagrees with his first issue, this is the earliest opportunity for him to present this issue. However, due to what the Texas Court of Criminal Appeals has accepted as presentment of an indictment, as discussed above, appellant should have been aware of this different treatment before trial began. As such, we conclude that appellant has forfeited his right to challenge the constitutionality of the different presentment requirements.

Sufficiency of Evidence

By his third through fifth issues, appellant challenges the sufficiency of the evidence supporting his convictions. Appellant's third issue challenges the sufficiency of the evidence establishing that he used or exhibited a deadly weapon during the commission of the assault offenses. Appellant's fourth issue challenges the sufficiency of the evidence establishing that the complainant was unable to resist appellant's advances, either physically or due to a mental disease or defect, and that appellant knew of the complainant's inability to resist at the time that the allegations of Count II occurred. His fifth issue challenges the sufficiency of the evidence establishing that the complainant was unable to resist appellant's advances and that appellant knew of the complainant's inability to resist at the time that the allegations of Count I occurred.

Standard of Review

In assessing the sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Id*. When reviewing all of the evidence under the *Jackson* standard of review, the ultimate

question is whether the jury's finding of guilt was a rational finding. *See id*. at 906-07 n.26 (discussing Judge Cochran's dissenting opinion in *Watson v. State*, 204 S.W.3d 404, 448-50 (Tex. Crim. App. 2006), as outlining the proper application of a single evidentiary standard of review). "[T]he reviewing court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id*. at 899.

Deadly Weapon Finding

A deadly weapon is defined as "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury" or "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17) (West Supp. 2016). To sustain a deadly weapon finding, the evidence must show that an object that meets the definition of a deadly weapon was used or exhibited during the transaction on which the felony conviction was based and other people were placed in actual danger. *Brister v. State*, 449 S.W.3d 490, 494 (Tex. Crim. App. 2014). Mere possession of a deadly weapon during the commission of a felony is not enough; rather, the deadly weapon must facilitate the associated felony to support a deadly weapon finding. *Plummer v. State*, 410 S.W.3d 855, 864-65 (Tex. Crim. App. 2013). In determining whether a weapon was used to facilitate a felony, the evidence must establish that the weapon furthered the commission of the offense or enabled, continued, or enhanced the offense. *Id*. at 865. Likewise, proximity is a factor in whether a deadly weapon was used or exhibited during the commission of a felony. *See id*. at 859 (discussing the "more than strategic proximity theory," which requires an evidentiary connection between the deadly weapon

and crime such that the deadly weapon "facilitated or could have facilitated" the crime); *Gale v. State*, 998 S.W.2d 221, 225-26 (Tex. Crim. App. 1999) (the proximity of the firearms to the contraband was sufficient for a rational factfinder to determine that the firearms were used to facilitate the crime of possession of the contraband).

In the present case, the complainant voluntarily went to appellant's trailer to help appellant install a satellite dish. Upon his arrival, the complainant saw that appellant had already installed the dish. Appellant asked the complainant if he wanted to watch some movies. Before watching the movies, appellant asked the complainant if he could trust him. After the complainant answered in the affirmative, appellant retrieved a gun and a box of ammunition from a cubbyhole that was attached to the outside of the residence. Appellant offered the gun to the complainant after taking out the magazine and clearing the chamber. After the complainant declined appellant's invitation to shoot the gun, appellant returned it to the cubbyhole outside. Once the gun was removed from the trailer, appellant and the complainant watched a movie, part of another movie, and then some portion of a pornographic movie before appellant initiated sexual contact with the complainant. There is no evidence that appellant left the trailer before the assault. Appellant did not brandish a weapon during the attack. Further, appellant made no reference to a weapon immediately before, during, or after the assault. Appellant did not threaten the complainant with harm during the attack. Throughout the assault that occurred entirely within appellant's trailer, the gun remained far from appellant's reach in the cubbyhole outside of appellant's trailer.

The evidence establishes that there was rather extensive attenuation in both time and proximity between the gun and the assault. While the State attempts to bridge this

gap by suggesting that appellant presented the handgun to the complainant as a means of grooming him for the subsequent assault, it fails to cite to any evidence supporting its proposition. Thus, we conclude that this proposition is too speculative to provide a sufficient connection between the weapon and the crime to support a deadly weapon finding. *See Plummer*, 410 S.W.3d at 859; *Gale*, 998 S.W.2d at 225-26.

Viewing the evidence in the light most favorable to the affirmative finding, the attenuation between when the weapon was shown, its location during the assault, and the time and place of the assault prevent us from deferring to the jury's determination. The record evidence does not permit a reasonable factfinder to conclude, beyond a reasonable doubt, that the firearm facilitated, furthered, enabled, or enhanced the commission of the sexual assault. As such, we sustain appellant's third issue and will reform the judgment to remove the deadly weapon finding from the judgments for Counts I and II.

Counts I & II

Appellant's challenge to the sufficiency of the evidence regarding Counts I and II relate to the evidence establishing that the complainant did not consent to the acts. To prove that appellant committed a sexual assault, the State was required to prove that appellant intentionally or knowingly caused the penetration of the complainant's anus by any means without the complainant's consent (Count I) and caused the sexual organ of complainant to contact or penetrate the mouth of appellant without complainant's consent (Count II). A sexual assault is without the other person's consent if: (1) the actor compels the other person to submit or participate by the use of physical force or violence, (2) the actor compels the other person to submit or participate by threatening

to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat, or (3) the actor knows, as a result of mental disease or defect, the other person is at the time of the sexual assault incapable of appraising the nature of the sexual assault or resisting it. TEX. PENAL CODE ANN. § 22.011(b)(1), (2), (4). The complainant's testimony alone, if believed by the jury, may be sufficient to support the conviction. TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West Supp. 2016).

In the present case, the complainant's mother testified that he had some disabilities and is unable to provide food or care for himself. She testified that the complainant had completed approximately a middle school education through homeschooling. The investigating officer testified that he could tell right away that the complainant "seemed a little slow" and that he thought it was possible that the complainant had previously suffered some sort of head injury. Further, the complainant testified, so the jury was able to assess whether the complainant was mentally capable of appraising the nature of the sexual assault and resisting it. Appellant and the complainant had interacted often prior to the date of the offense. This contact, coupled with the evidence that it was readily apparent that the complainant seemed slow, is sufficient to allow the jury to rationally conclude that appellant was aware that the complainant suffered from a mental defect that rendered him incapable of appraising the nature of the sexual assault or resisting it. We conclude that the evidence was sufficient to allow a rational jury to reach this implied finding. Concluding that the evidence is sufficient to establish a lack of consent under one of the provisions cited above, we overrule appellant's fourth and fifth issues.

Punishment Charge Error

By his sixth issue, appellant contends that the jury charge on punishment egregiously harmed appellant. Appellant contends that the punishment charge informed the jury that the offenses for which he had been found guilty were "aggravated sexual assault," rather than simple sexual assault. In addition, appellant contends that the jury was incorrectly informed of the range of punishment that would apply if the jury found that appellant had not committed one of the prior felonies that was alleged for punishment enhancement under the habitual offender statute. Appellant failed to object to either alleged charge error at trial.

When a claim of charge error is raised, the first duty of a reviewing court is to determine whether error exists at all. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If there is error but the appellant failed to timely object, he may obtain reversal only if the error is so egregious and created such harm that he has been denied a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Egregious errors affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

Appellant's contention regarding the range of punishment is that, if the jury had found that appellant had committed only one prior felony offense, the charge erroneously authorized the jury to consider life imprisonment. However, the punishment charge properly instructed the jury that, due to its finding that appellant had committed two properly sequenced felonies, the range of punishment was twenty-five to ninety-nine years or life. *See* TEX. PENAL CODE ANN. § 12.42(d). Furthermore, under section

12.42(b), if it is shown on trial for a second degree felony that the defendant has been previously convicted of a felony, the defendant shall be punished for a first degree felony. *Id*. § 12.42(b). The proper range of punishment for a first degree felony includes the possibility of life imprisonment. *Id*. § 12.32(a) (West 2011). As such, we do not find any error in the jury charge's instruction regarding the potential ranges of punishment.

Appellant also contends that the punishment charge erroneously informed the jury that the primary convictions under Counts I and II were for aggravated sexual assault rather than simple sexual assault. While the punishment forms do incorrectly identify the offense of conviction to have been aggravated sexual assault, the record reflects that the same jury had just found appellant guilty of two counts of sexual assault and that the first page of the punishment charge reflects that the jury had found him guilty of sexual assault. Appellant's only contention regarding how this error caused him egregious harm is that the offense of aggravated sexual assault is an offense in which children are frequently the victims. Even if we assume that this statement is true, appellant has failed to identify how such a fact would deprive him a fair and impartial trial, especially when the same jury that saw the erroneous punishment charge had just heard all of the evidence regarding the facts of this case and found appellant guilty of simple sexual assault with an adult. As such, we do not find the trial court's erroneous indication that appellant had been convicted of aggravated sexual assault to have caused appellant egregious harm.

We overrule appellant's sixth issue.

Reformation

By his seventh issue, appellant contends that the judgments regarding Counts I and II improperly reflect that appellant was convicted of the offense of aggravated sexual assault. By his eighth issue, appellant contends that the judgment improperly indicates that the trial court found that appellant used or exhibited a deadly weapon during the commission of unlawful possession of a firearm by a felon. He contends that the judgments should be modified to properly reflect that appellant was convicted of two counts of sexual assault and to remove the deadly weapon finding in relation to the unlawful possession of a firearm conviction.

"[A] trial court has a *sua sponte* duty to sign and enter a proper judgment" and, consequently, "a complaint that the judgment does not comport with the verdict or oral pronouncement of sentence cannot be forfeited by a failure to object in the trial court." *Garner v. State*, 214 S.W.3d 705, 706 (Tex. App.—Waco 2007, no pet.). An appellate court has the power to correct and reform the judgments of the court below to make the record speak the truth when it has the necessary data and information to do so. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). "Where a judgment and sentence improperly reflects the findings of the jury, the proper remedy is reformation of the judgment." *Id*.

Both the judgments in Counts I and II indicate that appellant was convicted of aggravated sexual assault. This is error since it is clear that appellant was indicted, tried, and convicted of sexual assault in both Counts I and II. As such, we reform these judgments to reflect that appellant was convicted of sexual assault.

Appellant also contends that the trial court erroneously found that appellant used or exhibited a deadly weapon in his conviction for unlawful possession of a firearm by a felon. Appellant concedes that the unlawful possession judgment indicates "N/A" as to the "Findings of a Deadly Weapon" on its first page. However, he contends that the third page of this judgment affirmatively finds that appellant used or exhibited a deadly weapon during the commission of the offense. Notably, the box beside the cited "deadly weapon finding" is not marked. As such, we conclude that the unlawful possession of a firearm by a felon judgment does not include an affirmative finding of use or exhibition of a deadly weapon and, therefore, overrule appellant's eighth issue.

Conclusion

We reverse the affirmative finding of use or exhibition of a deadly weapon as to Counts I and II, reform the judgments of Counts I and II to reflect that appellant was convicted of sexual assault under both counts and to remove the deadly weapon findings, and affirm the judgments as reformed.

Judy C. Parker
Justice

Publish.