In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00083-CR

BERNHARDT TIEDE, II, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 123rd District Court
Panola County, Texas
Trial Court No. 1997-C-103

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

In a second punishment trial, ordered by the Texas Court of Criminal Appeals years after the first punishment trial, a jury again rejected Bernhardt Tiede, II's, claim to have killed Marjorie M. Nugent in sudden passion arising from an adequate cause and assessed Tiede's punishment of ninety-nine-years or life imprisonment. We affirm the judgment of the trial court for reasons set out below.

This case has a significant backstory. A 1997 missing-person investigation conducted by the Panola County Sheriff's Department led to the discovery of Nugent's body. The eighty-year-old woman had been shot in the back four times and stuffed into her own deep freezer, where she had remained for quite some time. A 1999 jury trial resulted in a finding that Nugent's murder was committed by her full-time caretaker and companion, Tiede. During the punishment phase of this first trial, the jury rejected Tiede's claim of sudden passion arising from an adequate cause, which would have reduced the punishment range to that of a second-degree-felony offense, and assessed a sentence of life imprisonment, as well as a $10,000.00 fine.

Tiede appealed his conviction and sentence to the Twelfth Court of Appeals in Tyler, Texas, on the grounds that the trial court erred in overruling his *Batson*[1] challenges, the trial court erred in admitting his confession to the offense after he allegedly invoked the right to counsel, and the trial court erred in refusing to admit certain testimony by his psychologist during the punishment phase of his trial. *Tiede v. State*, 104 S.W.3d 552, 556 (Tex. App.—Tyler 2000), *judgm't vacated*, 76 S.W.3d 13 (Tex. Crim. App. 2002). Sustaining only Tiede's third point of

[1]*Batson v. Kentucky*, 476 U.S. 79 (1986).

error, which it labeled as constitutional error, the Tyler Court of Appeals affirmed the judgment of guilt, but reversed the trial court's judgment on punishment and remanded the matter to the trial court for a new trial on punishment only. *Id*. at 565.

In 2002, the Texas Court of Criminal Appeals vacated the judgment of the Tyler Court of Appeals and directed it to consider *Potier v. State*, 68 S.W.3d 657 (Tex. Crim. App. 2002), which discussed several factors courts are to analyze when considering whether the erroneous exclusion of evidence could rise to the level of constitutional error. *Tiede*, 76 S.W.3d at 14. Following the remand, the Tyler Court of Appeals found the exclusion of Tiede's psychologist's testimony harmless under *Potier* and affirmed the trial court's judgment in its entirety. *Tiede v. State*, No. 12-99-00182-CR, 2002 WL 31618281, at *1 (Tex. App.—Tyler Nov. 20, 2002, pet. ref'd) (not designated for publication).[2]

Eleven years later, Tiede filed a petition for a writ of habeas corpus with the Texas Court of Criminal Appeals, arguing that newly available scientific evidence contradicted the scientific evidence relied on by the State during the punishment phase of his trial. *Ex Parte Tiede*, 448 S.W.3d 456, 456 (Tex. Crim. App. 2014) (per curiam). Specifically, Tiede's habeas record demonstrated that the State's psychiatrist presented false testimony when he stated that Tiede had an unremarkable mental health history. *Id.* at 457 (Alcala, J., concurring). In fact, when before the Texas Court of Criminal Appeals on this issue, "the State agree[d] that [Tiede] caused the

[2]"Although unpublished cases have no precedential value, we may take guidance from them 'as an aid in developing reasoning that may be employed.'" *Carillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

decedent's death out of sudden passion arising from adequate cause"[3] and made "the factual representation that, had [the State] known [earlier] what it [later discovered], it would have sought to punish [Tiede] under a second-degree punishment range." *Id.* In her concurring opinion, which was joined by Judges Price, Johnson, and Cochran, Judge Alcala opined that,

> regardless of the merits of applicant's claim of sudden passion, the habeas evidence supports the conclusion that the jury likely would have sentenced applicant to a period of confinement for less than life in prison in light of the conclusive evidence that now explains his state of mind as experiencing dissociation when he killed the decedent.

Id. The Texas Court of Criminal Appeals granted Tiede's application for a writ of habeas corpus, set aside his sentence, and ordered a new trial on punishment only.[4] *Id.*

From the trial court's judgment imposing ninety-nine years' imprisonment, Tiede appeals, asserting (1) that the trial court erred in denying his motion to quash the indictment, which was based on the discovery that a member of the grand jury was biased against Tiede before the indictment was returned, (2) that the trial court erred in failing to enforce a sentencing agreement, (3) that the trial court erred in failing to grant his motion to suppress his confession to the crime, (4) that he was denied his "due process right to a fair trial and Sixth Amendment right to an impartial jury . . . by the atmosphere surrounding the trial and improper comments directed at the

---

[3]When presented with the newly-discovered evidence, which included the fact that Tiede had been sexually abused by his uncle for a period of several years, the State's psychiatrist changed his opinion and stated that:

> based on reasonable psychiatric probability, a review of [Tiede's] history and the history of the offense, as it is described, would indicate that he suffered from a Dissociate Episode, at that time. It would appear that the totality of his history of sexual abuse, his abusive/negative relationship with the victim, and a culmination of other emotional factors resulted in an act of sudden passion/emotion.

[4]In spite of the concurring opinion's language, nothing in the main opinion or the mandate precluded the submission of the sudden passion issue to the jury.

jury by spectators," and (5) that the verdict containing two distinct and conflicting punishments is void.

We affirm the judgment of the trial court because, (1) based on its limited jurisdiction on remand, the trial court correctly denied the motion to quash the indictment, (2) a sentencing agreement was not established, (3) the law of the case governed the issue involving suppression of Tiede's confession, (4) the issues preserved by Tiede relating to the atmosphere of the trial and improper comments by spectators do not warrant reversal, and (5) the trial court properly modified Tiede's sentence to ninety-nine years' imprisonment.

(1) Based on its Limited Jurisdiction on Remand, the Trial Court Correctly Denied the Motion to Quash the Indictment

At Tiede's 1999 trial, the State called R.D. Green to testify against Tiede during punishment. Green testified that he went to church with Tiede, had known him for at least twelve years, and had personal knowledge of Tiede's character before the murder. Based on his personal knowledge, Green informed the jury that Tiede had a bad character.

After the Texas Court of Criminal Appeals' remand for a new trial on punishment, Panola County District Attorney Danny Buck Davidson recused from the case, and two assistant attorney generals were appointed as district attorneys pro tem. The Texas Attorney General's (AG's) Office conducted interviews with potential witnesses, including Green. Jeanette Whitehead, a legal assistant with the AG's Office, filed an affidavit which stated that, on February 2, 2016, she came across a report drafted by Lieutenant Missy Wolfe of the AG's office "which summarized an interview she conducted with [Green,] a prosecution witness from the original trial who was

determined, on Lt. Wolfe's interview, to have been a grand juror on Tiede's case." Wolfe confirmed this information in her own affidavit.

The interoffice memorandum, created by Wolfe on November 27, 2015, specifically stated that Green was a member of the grand jury that indicted Tiede, as well as a witness for the State. The memo further stated,

> Green "never really cared for" the defendant, and always thought of him as a "phony." . . . Green avoided him as much as possible. Green knew that Tiede was a "bad person," and this had nothing to do with "him being gay." Green always knew that Tiede was a "shyster." . . . Green heard that his church had to return the $100,000.00 that Tiede originally donated for renovations. . . . Recently, Green was interviewed by a Houston reporter, and he relayed his strong feelings about the defendant. Green believes that people who murder others should only be kept alive so that their organs can be harvested when necessary."

The memorandum was produced to Tiede's attorneys. On April 5, 2016, Tiede filed a motion to set aside the indictment on the ground that newly discovered evidence revealed that one of the grand jurors who indicted Tiede possessed a bias and prejudice against him. Although the mandate by the Texas Court of Criminal Appeals allowed for a new trial only on punishment, Tiede argued that the issue could be reached since "no one knew back then that the person on the grand jury was this person that did not like Mr. Tiede." Concluding that Tiede could not raise issues affecting guilt/innocence, the trial court denied Tiede's motion to quash the indictment.

On appeal, Tiede argues the merits of his motion to quash the indictment and the timeliness of his motion.[5] He does not, however, address the trial court's jurisdiction to handle this matter. Article 44.29(b) of the Texas Code of Criminal Procedure provides, in pertinent part, as follows:

[5]"A challenge to a particular grand juror may be made . . . [if] the juror has a bias or prejudice in favor of or against the person accused or suspected of committing an offense that the grand jury is investigating." TEX. CODE CRIM.

> If the court of appeals or the Court of Criminal Appeals awards a new trial to a defendant . . . only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial.

TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (West Supp. 2016). Therefore, "the trial court's jurisdiction on remand is limited to issues concerning the punishment phase." *Lopez v. State*, 18 S.W.3d 637, 639 (Tex. Crim. App. 2000); *see Russeau v. State*, 291 S.W.3d 426, 432 (Tex. Crim. App. 2009).

Tiede's guilt was decided by a jury in 1999 and affirmed by the Tyler Court of Appeals in 2002. Because quashing the indictment would have impacted the issue of guilt, such an action would have exceeded the authority on remand granted to the trial court by the Texas Court of Criminal Appeals. Accordingly, based on its limited jurisdiction on remand, the trial court properly denied the motion to quash the indictment. We overrule this point of error.

(2) A Sentencing Agreement Was Not Established

One year after Davidson's recusal, Tiede filed a motion to enforce an alleged sentencing agreement with Davidson, which the AG's office vehemently opposed. Tiede's motion recited

---

PROC. ANN. art. 19.31(a)(5) (West Supp. 2016). However, timeliness of such a challenge is proscribed by Article 19.27, which states, "Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard." TEX. CODE CRIM. PROC. ANN. art. 19.27 (West 2015). The Texas Court of Criminal Appeals has interpreted this statute to mean that any challenge to the grand jury must be made "at the first opportunity, . . . which ordinarily means when the grand jury is impaneled." *Muniz v. State*, 573 S.W.2d 792, 796 (Tex. Crim. App. 1978). There is an exception, however, in cases like this one, where the challenge is impossible, "such as when the offense occurs after the grand jury is impaneled." *Id.* In such cases, the challenge must be made in a timely-filed motion to quash. *Id.* (citing *Ex parte Covin*, 277 S.W.2d 109, 111 (Tex. Crim. App. 1955)). Tiede argues that his motion was filed at the first opportunity. Because the trial court correctly determined it was without jurisdiction to quash the indictment, we need not discuss whether the motion was timely.

that "the State of Texas and Mr. Tiede entered into a contract whereby the State agreed to seek a time-served sentence in exchange for Mr. Tiede's agreement not to pursue [habeas] claims related to the guilt/innocence stage of trial." After a hearing, the trial court denied Tiede's motion. In his second point of error on appeal, Tiede argues that the trial court erred in failing to enforce the sentencing agreement Davidson had allegedly entered into with Tiede's counsel, Jodi Calloway Cole.

Tiede cites cases discussing the binding nature of a plea agreement, which is "a contract between the State and the defendant." *Ex parte De Leon*, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013); *see generally Santobello v. New York*, 404 U.S. 257 (1971).[6] Tiede acknowledges (1) that "[a] plea agreement is an executory contract and does not become operative until the plea has been entered and the court has announced that it will be bound by the agreement,"[7] (2) that "[a] defendant does not have a protected right to enforce performance of an agreement if it is subsequently withdrawn by the State,"[8] and (3) that Tiede did not plead guilty. However, Tiede

[6]In *In re Duffey*, 459 S.W.3d 216, 222 (Tex. App.—Texarkana 2015, orig. proceeding), this Court explained:

> Finalizing a plea agreement involves two steps. *Zapata v. State*, 121 S.W.3d 66, 69 (Tex. App.—San Antonio 2003, pet. ref'd). First, the defendant and the State reach an agreement; when the defendant enters his plea to the trial court, the agreement is binding on both parties only. *Id.* Second, the trial court must accept or reject the recommended punishment; if the court accepts the recommended punishment, the plea agreement becomes binding upon both parties and the court. *Id.* at 70. Conversely, if the trial court rejects the punishment recommendation, the defendant may withdraw his guilty plea, and neither party is bound by the plea agreement. *Id.*

We further explained that, in order for a plea agreement to be binding, the trial judge must accept it. *Id.* This is not a plea-agreement case.

[7]*Bryant v. State*, 974 S.W.2d 395, 398 (Tex. App.—San Antonio 1998, pet. ref'd) (citing *Ex parte Williams*, 637 S.W.2d 943, 947 (Tex. Crim. App. 1982)).

[8]*Bryant*, 974 S.W.2d at 398 (citing *Purser v. State*, 902 S.W.2d 641, 648 (Tex. App.—El Paso 1995, pet. ref'd)); *see* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (West Supp. 2016) ("Prior to accepting a plea of guilty or nolo

argues that, because "[w]e apply general contract-law principles to determine the intended content of a plea agreement," the State should have been required to uphold its end of the bargained-for exchange by recommending a "time-served sentence" to the jury. *Leon*, 400 S.W.3d at 89. In order to properly address Tiede's argument, we first review the evidence submitted to support the existence of the alleged sentencing agreement.

Before Tiede's habeas petition was filed, Cole wrote to Davidson, on February 3, 2014, to inform him of her intent to file "[her] original habeas" in the event Davidson would be "unable to join in a habeas." As opposed to the petition that was filed with the Texas Court of Criminal Appeals, Cole's letter stated that she would raise issues involving coercion of Tiede's confession, ineffective assistance of counsel, and other alleged improprieties. In exchange for her forbearance from raising these issues, Cole's letter suggested "A Positive Alternative" in which Davidson would (1) "join [Cole] in a habeas," (2) "stipulate to the findings of fact and conclusions of law," and (3) "join [Cole] in filing a . . . bond" motion releasing Tiede from prison during the pendency of the habeas proceedings. The letter further stated, "As our hearing is set for Wednesday of this week, I must receive your affidavit agreeing to the 16 year sentence . . . . In the meantime, I will be preparing my original habeas until I receive a firm commitment from you in the form of your signed affidavit."

contendere, the court shall admonish the defendant of: . . . the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court.").

Although the record contains no response to Cole's letter by Davidson, it is apparent that they had reached some sort of understanding. During the habeas proceeding, the trial court entered findings of fact, including the following:

> 66. When the underlying conviction was obtained, the State was represented by its elected Criminal District Attorney, Danny Buck Davidson.
>
> 67. Having had the opportunity to review the newly discovered and/or newly available evidence in the case, Mr. Davidson, who is still the elected Criminal District Attorney, has indicated that, although he would still have prosecuted the case as a murder case, he would have sought a significantly lower sentence than he sought or obtained.
>
> 68. Specifically, Mr. Davidson has indicated that, with knowledge of all the newly available evidence, he would have sought only a twenty-year sentence. Furthermore, there would be no guarantee that Mr. Davidson would have received the requested sentence of 20 years; as the entire range of punishment for which Mr. Tiede was eligible was 2-20 years in [Texas Department Criminal Justice Correctional Institutions Division].

The findings of fact were signed and approved by Davidson. Joining the habeas petition, Davidson filed an affidavit stating that, in light of the newly-discovered evidence he "made new, fully informed assessments of the circumstances surrounding the shooting event and Mr. Tiede's lack of future dangerousness." The affidavit continued:

> I now feel that a life sentence is an inappropriate sentence for Mr. Tiede . . . .
>
> Based on my extensive review of all of the above mitigating evidence, I would have still prosecuted Mr. Tiede for murder. However, I would have sought the maximum penalty provided under the sudden passion provision . . . which . . . was 20 years . . . .
>
> Had Mr. Tiede been sentenced to two to 20 year range, he would have been released outright or be on parole by now. Therefore, I am agreeable to considering his sentence to be time served.

Tiede was also released on bond during the pendency of the habeas proceedings.

The Texas Court of Criminal Appeals reviewed the trial court's findings of fact and Davidson's affidavit in determining that Tiede was entitled to a new trial on punishment. Although this evidence only speaks to what punishment Davidson "would have sought" or "was agreeable to considering," Tiede believes that this evidence establishes that he had reached a sentencing agreement with the State. We disagree.

First, although Cole's letter requested an "affidavit agreeing to the 16 year sentence," Davidson's affidavit merely stated that he was "agreeable to considering his sentence to be time served." Without evidence of Davidson's response to Cole's letter, or any other memorialization of the negotiations between the two, we find the difference in terminology significant. As for Cole's benefit-of-the-bargain argument, although Cole did not include challenges to the guilt/innocence phase in Tiede's habeas petition, Article 11.07, Section 4, of the Texas Code of Criminal Procedure does not necessarily preclude the filing of a subsequent writ of habeas corpus. TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2015).

Moreover, a transcript from a January 1, 2015, status conference, conducted after the remand, demonstrated that the parties were still working toward an agreement, and neither Tiede nor the State objected to the trial court setting a date for the new punishment trial. When asked about the State's position on bond, Davidson stated,

> Asking you to put the defendant in the Panola County jail now would cost its taxpayers $50 a day until both the punishment trial and the murder case and the first degree felony case are over. And I assure you it will take much longer than anyone

> anticipates to dispose of these two trials and appeals, all at the expense of Panola County taxpayers.[9]
>
> If the defendant went to our county jail now, he would get credit for time served if he later gets more pen time at the punishment trial and the theft trial.
>
> If the defendant gets additional pen time, I think he should serve it in the state penitentiary and not in our county jail at our County's expense . . . .
>
> I don't object to the defendant being left on conditional bond supervised by the Travis County Probation Department.

As the State argues, the argument that Davidson reached a sentencing agreement during the habeas proceedings for a "time-served" sentence is contradicted by Davidson's statements of the possibility of "more pen time at the punishment trial." Davidson's statements, which were made to the trial judge who presided over the habeas proceedings, prompted the following exchange at the January 1, 2015, hearing:

> THE COURT: That brings up another question. At the last hearing, you specifically said I think it was by affidavit -- and it was included in our findings of fact and conclusions of law that there was an agreement as to the time served credit on the murder charge. Is that the agreement or is it not the agreement?
>
> [State's Attorney]: Your Honor, we're going to visit with the victim's family and we're going to take into consideration their wishes and we're going to review what was done and what the Court's judgment, Court of Appeals judgment said when they overturned the punishment for life and ordered a new punishment hearing . . . .
>
> [Defense Attorney]: Response, Your Honor?
>
> THE COURT: Go ahead.
>
> [Defense Attorney]: There are so many moving parts. I'm in full agreement with Mr. Davidson that it is premature to know what that final result is going to be

[9]In a separate case, Tiede was indicted for theft of Nugent's money.

> or what -- or even guess at that. So we also understand that. We have no objection to delaying any kind of comment on that.
>
> THE COURT: . . . If there is anything, any concerns either of you have about compliance with the terms of that mandate, we need to raise those now. Otherwise, we're going to proceed with setting punishment hearing, set pretrial date, set the trial date and move forward.
>
> Now, if there was some agreement that was made -- and I never accepted any agreement. There was never anything of that nature. But it certainly was discussed. It was put in the papers.
>
> And so what you're telling me right now, if I'm reading you correctly, is that you just want some time to discuss it, discuss it with the victims, come back on March 3rd and have something to say at that point . . . .
>
> [State's Attorney]: Your Honor, I want an opportunity to visit with my victims to get their feelings on punishment.

This exchange demonstrates that there was no "final result" and that Davidson had not yet actually agreed to a time-served sentence.

The events following the first status hearing also fall short of establishing an agreement. A February 13, 2015, email from Cole to Davidson, with the subject line stating, "Here's an idea to get this wrapped up-this is my best case dream scenario," suggested that Davidson release a press statement in which he would agree to time-served in the murder and theft cases. Cole further indicated that she would have the plea paperwork drafted. No response from Davidson to Cole's email was included in the appellate record. On February 24, 2015, the attorney for Nugent's family, wrote to the trial court to inform it that "[t]he District Attorney's Office has not informed the Family of any pending plea arrangement or negotiation," and that the family would be opposed to such an agreement. On February 25, 2015, Davidson, in another move inconsistent with Tiede's representation that there was a sentencing agreement, sent a request for a Prosecutor Pro Tem to the AG's Office.

In a March 16, 2015, e-mail, Cole informed the trial court that she wished to reschedule a telephone conference, stating, "Danny Buck and I are talking again this afternoon, and we have really made progress working together to find good solutions for the case dispositions."[10] That e-mail suggested that communications between Cole and Davidson were progressing toward an agreement, not that a final agreement had been reached. On March 30, 2015, after meeting with Nugent's family, Davidson moved that he be recused from the case on the ground that he had become a witness in the case. The trial court approved Davidson's recusal on March 31, 2015.

When the AG's office was appointed to the case, it took the position that no sentencing agreement had been reached. For approximately one year, both sides prepared for trial.[11] It was not until March 18, 2016, that Cole asked the trial court for an exception to its existing "Restrictive and Protective Order," which would allow the publication of an attached proposed statement to the press stating, among other things, that Davidson gave her "his word that he was going to recommend a sentence of back time." Nothing in the appellate record suggested either that the trial court granted this motion or that Cole's statement was released to the press. The trial court heard argument on Tiede's motion to enforce a sentencing agreement on March 31, 2016, overruled the motion, and presided over the April 4, 2016, trial.

Both parties made unsworn representations and arguments at the hearing on Tiede's motion to enforce a sentencing agreement. The State argued that Davidson had recused, that the AG's

[10]Davidson was copied on that e-mail.

[11]Between the time of Davidson's recusal and the filing of the motion to enforce the sentencing agreement on March 31, 2016, the trial court held four separate hearings, handling motions for continuances, motions for psychiatric evaluations of Tiede, motions to suppress evidence, miscellaneous challenges related to the admissibility of evidence, motions in limine, scheduling issues, matters involving the press, and other pretrial matters.

Office had spoken with Davidson, and that Davidson told them that there was never a finalized sentencing agreement. In response, Tiede argued, "[T]here was an agreement reached between Ms. Cole and Danny Buck Davidson that 'I won't attack the entire conviction. We'll limit our writ to just the punishment.' In turn, Danny Buck Davidson said, 'If you do that, I will seek a 20-year sentence, which is basically time served.'" Although Tiede had subpoenaed Cole and Davidson, who were present at the hearing, they did not testify at the hearing. Instead, Tiede made the following offer of proof:

> [T]hat Ms. Jodi Cole would have testified that she had that firm agreement with Danny Buck Davidson. That's the reason they also went for a bond for Mr. Tiede. Mr. Davidson agreed to that. Everything was agreed to that he was going to ask for a 20-year sentence, which he considered to be time served because of back time. Based on those agreements, all of the rest has happened, Judge. So Ms. Cole would testify to that and also Danny Buck Davidson would testify to that agreement.

In denying Tiede's motion, the trial court remarked, "And if there's an agreement that everybody agreed to, I don't know where it is. I mean, I've been asking for it since January, and nobody seems to have one."

Based on the evidence recited above, including the offer of proof, Tiede asks this Court to apply civil contract principles to this dispute. Yet, doing so does not establish Tiede's entitlement to relief.

> Parties form a binding contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding.

In re Green Tree Servicing, LLC, 275 S.W.3d 592, 598 (Tex. App.—Texarkana 2008, no pet.) (quoting *KW Constr. v. Stephens & Sons Concrete Contrs., Inc.*, 165 S.W.3d 874, 883 (Tex.

App.—Texarkana 2005, pet. denied)). "Regardless of whether a contract is based on express or implied promises, mutual assent must be present." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009). "The determination of a meeting of the minds is based on the objective standard of what the parties said and did, not on their subjective states of mind." *Parker Drilling Co. v. Romfor Supply Co*., 316 S.W.3d 68, 75 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.)). "Where a meeting of the minds is contested, as it is here, determination of the existence of a contract is a question of fact." *Angelou*, 33 S.W.3d at 278; *see Fraud-Tech, Inc. v. Choicepoint, Inc*., 102 S.W.3d 366, 386 (Tex. App.—Fort Worth 2003, pet. denied); *Buxani v. Nussbaum*, 940 S.W.2d 350, 352 (Tex. App.—San Antonio 1997, no writ); *Hallmark v. Hand*, 885 S.W.2d 471, 476–77 (Tex. App.—El Paso 1994, writ denied).

Although Tiede made an offer of proof stating that Cole would testify that she had a firm agreement with Davidson, Tiede failed to state when the alleged firm agreement was made. Applying civil contractual principles to this case, Cole's letter represents an offer, but the record does not demonstrate that Davidson accepted the offer in strict compliance with the terms of the offer. While Cole's letter requests an affidavit agreeing to a sixteen-year sentence, the statement that Davidson "was going to agree" to a time-served sentence falls short of establishing that Davidson had agreed to the same. Moreover, to the extent that Tiede argued that the agreement was made before the January 1, 2015, hearing, the transcript from that hearing revealed that an agreement had not yet been reached. While it certainly appeared that Cole and Davidson were working towards a sentencing agreement, as of Cole's March 16, 2015, e-mail to the trial court,

discussions were still progressing. Shortly thereafter, Davidson recused from the case, and no evidence established that Cole and Davidson reached an agreement between the March 16, 2015, e-mail and Davidson's March 31, 2015 recusal. Based on these facts and the State's argument that mutual assent was not reached, we cannot conclude that the trial court would have been required to find the existence of mutual assent as a matter of law.[12] Simply put, we find that Tiede did not meet his burden of establishing that a sentencing agreement with the State had been reached.[13] We overrule this point of error.

(3) The Law of the Case Governed the Issue Involving Suppression of Tiede's Confession

In 1998, Tiede had filed, and the trial court had denied, a motion to suppress his confession to law enforcement officers. "Adopt[ing] the factual and legal assertions made in the previously filed motion to suppress evidence," Tiede again filed a motion to suppress the statements he made following the Texas Court of Criminal Appeals' remand. The trial court denied this motion to suppress, finding that the issue was governed by the law of the case doctrine. Tiede argues that the trial court's ruling was erroneous. We disagree.

As discussed above, in 2000, Tiede argued to the Tyler Court of Appeals that the trial court erred in admitting his confession to the offense after he allegedly invoked the right to counsel.

[12]"Whether the parties intended to enter an agreement is generally a question of fact." *Sadeghi v. Gang*, 270 S.W.3d 773, 776 (Tex. App.—Dallas 2008, no pet.). "When an agreement leaves material matters open for future adjustment and agreement that never occur, it is not binding on the parties and merely constitutes an agreement to agree." *Martin v. Martin*, 326 S.W.3d 741, 749 (Tex. App.—Texarkana 2010, pet. denied).

[13]Therefore, because we determine that Tiede failed to establish that a sentencing agreement was reached, we need not discuss whether Tiede would have been able to enforce a sentencing agreement by specific performance.

Tiede, 104 S.W.3d at 556. In his brief, Tiede readily admits that "[t]his issue was raised in Tiede's first appeal." Thus, the law of the case doctrine is implicated.

"The 'law of the case' doctrine provides that an appellate court's resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue." *State v. Swearingen*, 424 S.W.3d 32, 36 (Tex. Crim. App. 2014); *see Ware v. State*, 736 S.W.2d 700, 701 (Tex. Crim. App. 1987). "In other words, when the facts and legal issues are virtually identical, they should be controlled by an appellate court's previous resolution." *Swearingen*, 424 S.W.3d at 36. "This is a court-made doctrine designed to promote judicial consistency and efficiency." *Id.*

However, the "doctrine's application is not inflexible." *Howlett v. State*, 994 S.W.2d 663, 666 (Tex. Crim. App. 1999). "An appellate court may reconsider its earlier disposition of a point of law if the court determines there are 'exceptional' circumstances that mitigate against relying on its prior decision." *Id.* Tiede attempts to revive the suppression issue by arguing (1) that additional or different facts were presented at the more recent hearing on the motion to suppress and (2) that the Tyler Court of Appeals did not have the benefit of caselaw developed after its ruling.

With respect to his argument that different facts were presented at the more recent hearing, Tiede relies on the Tyler Court of Appeals' opinion, in which the court stated that Tiede asked David Earl Jeter, formerly a Captain with the Panola County Sheriff's Department, "to let him know what they found at his home." *Tiede*, 104 S.W.3d 561. Tiede asserts "In this appeal, the record is clear that Jeter informed Tiede that he would come back and tell him what was found in

his home." Based on this discrepancy, Tiede argues, "We can only assume the evidence was different the first time around, because the records from the initial trial are not included in the record before the Court."

This Court will not speculate about the contents of the testimony presented at the original suppression hearing because it is the appellant's burden to bring forth a record demonstrating his entitlement to relief. *See Amador v. State*, 221 S.W.3d 666, 675 (Tex. Crim. App. 2007). Additionally, Jeter testified that he and Tiede were friends and that Tiede gave oral and written consent for the officers to search his home. He further stated that Tiede asked him to return to the jail after the search to let him know what items had been recovered from his home. Jeter testified that he complied with Tiede's request and informed him of what types of items the officers had found. Thus, the record demonstrates the lack of new or additional facts that could preclude the application of the law of the case doctrine.

Next, Tiede argues that the Tyler Court of Appeals did not have the benefit of more recent caselaw, namely *Cross v. State*, 144 S.W.3d 521, 528 (Tex. Crim. App. 2004), and *Pecina v. State*, 268 S.W.3d 564, 568 (Tex. Crim. App. 2008). Therefore, Tiede argues that the legal basis of his suppression argument differs from that of the first appeal. Importantly, however, (1) Tiede's motion to suppress firmly established that it merely "[a]dopt[ed] the . . . legal assertions made in the previously filed motion to suppress evidence," (2) Tiede did not reference *Cross* or *Pecina* at

the suppression hearing, and (3) he does not argue that the Tyler Court of Appeals' decision would have been affected by *Cross* or *Pecina*.[14]

The Tyler Court of Appeals disposed of Tiede's issue and, ultimately, affirmed Tiede's conviction. *Tiede*, 2002 WL 31618281, at *1. Because we find that the trial court correctly determined that the law of the case governed Tiede's suppression issue, we will not revisit the matter here.[15] We overrule this point of error.

(4) Preserved Issues Relating to the Atmosphere of the Trial and Improper Comments by Spectators Do Not Warrant Reversal

Tiede also argues that his Sixth Amendment right to an impartial jury and his due process right to a fair trial were violated by the atmosphere surrounding the trial. "As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ." TEX. R. APP. P. 33.1(a)(1). After reviewing the appellate record, we find many of the complaints discussed in Tiede's fourth point of error unpreserved.

Without directing us to particular errors committed by the trial court, Tiede notes that this was a high-profile case that had been featured in a Hollywood movie,[16] that protesters holding

[14]*Cross* and *Pecina* both clarify that, once a suspect invokes the right to counsel during an interrogation, the suspect must be the one to reinitiate contact with detectives and validly waive his rights to counsel. *Cross*, 114 S.W.3d at 527; *Pecina*, 268 S.W.3d at 568. In its previous opinion, the Tyler Court of Appeals correctly stated, "Once a suspect invokes his Fifth Amendment right to counsel, the police cannot interrogate him further until counsel has been provided for him, or until the suspect himself initiates further communications, exchanges, or conversations with the police." *Tiede*, 104 S.W.3d at 560. It further found that Tiede "re-opened the conversation by asking Jeter to let him know what they found at his home" and waived his right to counsel before confessing to the murder. *Id.*

[15]*See* 43B George E. Dix, et al., *Texas Practice Series: Criminal Practice & Procedure* § 59:13 (3d ed. 2011).

[16]The movie *Bernie* premiered in 2011 and was released in 2012.

signs were present outside of the courtroom during the punishment trial, and that two jurors were accused of discussing the case with those not on the jury, although both jurors denied doing so when questioned by the trial court. Although these facts are included in describing the "atmosphere" of the case, Tiede points to no particular errors committed by the trial court with respect to these matters and cites us to no constitutional argument that was asserted as a result of these contributions to the "atmosphere" of the punishment trial. Thus, assuming that Tiede attempts to raise constitutional issues related to these facts, we find them unpreserved.

Next, Tiede complains of outbursts involving Nugent's son, Rodney Nugent, Jr., and her granddaughter, Shanna Nugent. The first objectionable statement came from Rodney, who stated at the punishment trial that "[Tiede] should be tried for his crimes . . . it should be a capital case." The second outburst, which was not mentioned in the reporter's record, came from Shanna. Shanna's outburst was brought to light by Tiede's motion for a new trial, which attached the affidavit of Brian K. Walker, who was in the audience watching the punishment trial. Walker's affidavit stated,

> I witnessed something that I have never seen in over 70 jury trials in which I have participated.
>
> During the testimony of a particular witness who was related to the murder victim in the case, another family member sitting in the courtroom gallery began yelling. At a significant point in the gentleman's testimony, the grand-daughter of the murder victim, who was sitting in the gallery very close to the jury box, began yelling repeatedly that "he is lying!" This continued several times until several jurors looked away from the witness and started looking directly at the grand-daughter and listening to her outbursts. Although the judge didn't hear the outbursts, and the defense attorneys didn't seem to notice, it appeared that the prosecutors, which were sitting within feet of the grand-daughter, heard the outbursts but chose to ignore them. I was surprised to see that the grand-daughter began making direct eye contact with the jurors who were looking her way and

> yelling directly to them that the witness was "lying." When all was said and done, the grand-daughter had to have shouted "he is lying" over a handful of times directly to the jurors in the jury box. . . .
>
> I make this affidavit because I personally believe the grand-daughter's conduct could very easily have affected the jurors' respective mindsets, and could have easily had some bearing on the verdict in the case.

The State argues that Tiede has failed to preserve his complaints on appeal. With respect to Tiede's argument based on the Sixth Amendment, we agree. Although these outbursts were the subject of Tiede's motion for a new trial, which was overruled by operation of law,[17] omitted from Tiede's motion was any argument that his Sixth Amendment right to an impartial jury had been violated by Rodney and Shanna's outbursts. "[A]lmost all error—even constitutional error—may be forfeited if the appellant failed to object." *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). Because the Sixth Amendment violations Tiede now raises on appeal were never presented to the trial court, Tiede failed to preserve these issues for our review. *Delrio v. State*, 840 S.W.2d 443, 446 (Tex. Crim. App. 1992); *see Sharper v. State*, 485 S.W.3d 612, 615 (Tex. App.—Texarkana 2016, no pet.).

We realize that, in his motion for a new trial, Tiede argued that Rodney's outburst "violated his right to due process of law under the Fifth and Fourteenth Amendments."[18] However, to preserve error on appeal, "[t]he objection must be made at the earliest possible opportunity," *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993), "at a time when the trial court is in

[17]Tiede does not argue that the trial court erred in overruling the motion for a new trial.

[18]No further explanation or analysis was presented to the trial court.

a proper position to do something about it," *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). *See* TEX. R. APP. P. 33.1(a)(1) (requiring a timely objection). Tiede immediately objected to Rodney's statement, but only on the ground that it was "nonresponsive." No further objections were presented at that time, and the jury heard testimony from another witness, John Noble. After Noble's testimony concluded, Tiede asked the trial court to instruct the jury to disregard Rodney's statement that the case should be a "capital case."[19] The trial court agreed to submit the instruction but denied Tiede's motion for a mistrial on that basis. During that time, Tiede failed to raise any constitutional issues. Accordingly, he failed to preserve his due process issue with respect to Rodney's outburst.[20] *See Luna v. State*, 268 S.W.3d 594, 604 (Tex. Crim. App. 2008).

Last, the State argues that Tiede's motion for a new trial, arguing that Shanna's alleged outburst "violated his right to due process of law under the Fifth and Fourteenth Amendments," was also insufficient to preserve the error.[21] Assuming that error was preserved, Tiede was required to demonstrate that he was harmed by the outburst. To show that external influences on the jury, such as a bystander outburst, created reversible error, "a defendant must demonstrate

[19]Tiede does not argue that the trial court erred in overruling the motion for mistrial. He also does not complain of any specific action or inaction by the trial court.

[20]In any event, the trial court instructed the jury to disregard the statement made by Rodney. Because "[w]e presume the jury follows the trial court's instructions," Tiede would be unable to demonstrate harm. *Mosley v. State*, 141 S.W.3d 816, 827 (Tex. App.—Texarkana 2004, pet. ref'd).

[21]*See Shedden v. State*, 268 S.W.3d 717, 735 (Tex. App.—Corpus Christi 2008, pet. ref'd) (objection arguing that trial court's refusal to compel State to disclose identity of confidential informant violated "due process' rights . . . was not specific enough to preserve [appellants'] arguments that the ruling violated their rights to a 'fair trial.'"); *see also Bell v. State*, 90 S.W.3d 301, 305 (Tex. Crim. App. 2002) ("It is not sufficient that appellant raise only a general constitutional doctrine in support of his request for relief.").

actual or inherent prejudice." *Maxson v. State*, 79 S.W.3d 74, 78 (Tex. App.—Texarkana 2002, pet. ref'd) (citing *Howard v. State*, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535 (Tex. Crim. App. 2014), and *Simpson v. State*, 119 S.W.3d 262 (Tex. Crim. App. 2003)). "Actual prejudice occurs when the jurors articulate 'a consciousness of some prejudicial effect.'" *Maxson*, 79 S.W.3d at 78 (quoting *Howard*, 941 S.W.2d at 117). Inherent prejudice, which is rare and "reserved for extreme situations," "occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.* (quoting *Howard*, 941 S.W.2d at 117). "In other words, bystander conduct that interferes with normal trial proceedings will not result in reversible error unless the defendant shows 'a reasonable probability that the conduct or expression interfered with the jury's verdict.'" *Id.* (quoting *Howard*, 941 S.W.2d at 117).

Tiede relies on the inherent prejudice argument.[22] However, the record must support this claim. *Howard*, 941 S.W.2d at 117 (finding no inherent prejudice in the face of a "sparse" record). Here, there was no hearing on the motion for new trial. In order for us to find that the jury was improperly influenced by an outburst, as Tiede suggests, the record must support a finding that the jury heard the outburst. Walker's affidavit established that neither the trial judge nor defense counsel noticed or heard Shanna's statements that the witness was lying. Although the affidavit mentions that the jury was looking at Shanna, it is insufficient to establish that the jury heard her.

[22]In support of his position, Tiede cited this Court to *Stockton v. Com. of Va.*, 852 F.2d 740, 743 (4th Cir. 1988), which acknowledged that a "defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict."

Further, Walker's statement regarding his personal belief that the statement might have affected the jury's verdict is nothing more than speculation. Thus, harm cannot be established from Shanna's alleged outburst.

We overrule this point of error.

(5) The Trial Court Properly Modified Tiede's Sentence to Ninety-Nine Years' Imprisonment

After rejecting Tiede's claim that he caused Nugent's death under the immediate influence of sudden passion arising from an adequate cause, the jury assessed a sentence of "99 years or life." In open court, the judge pronounced the sentence at "99 years, life imprisonment" and the trial court's judgment originally recited that Tiede was sentenced to "ninety-nine (99) years or life."

Section 12.32 of the Texas Penal Code states, "An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. § 12.32 (West 2011). Therefore, under Section 12.32, a sentence of life imprisonment is different than a sentence of ninety-nine years' imprisonment. *Tollett v. State*, 799 S.W.2d 256, 259 (Tex. Crim. App. 1990). Accordingly, Tiede filed a motion for a new trial arguing that the sentence was not authorized by Section 12.32. In response, the State asked the trial court to modify the judgment. The trial court agreed and issued a new judgment modifying its original judgment by sentencing Tiede to ninety-nine years' imprisonment. In his last point of error, Tiede argues that his sentence is illegal and void because it was not authorized by law.

A sentence that is outside the maximum or minimum punishment range is unauthorized by law and thus void and illegal. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003); *Baker v. State*, 278 S.W.3d 923, 926 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Here, sentences of life imprisonment and ninety-nine years' imprisonment are both within the range of punishment of Section 12.32. Therefore, the assessed sentence does not constitute an illegal or void sentence.[23]

Next, Tiede contends that the trial court erred in issuing a judgment nunc pro tunc. We find that the trial court's modified judgment was mistakenly titled as a judgment nunc pro tunc. Because "[n]unc pro tunc orders are for correction of clerical errors, not judicial errors," the trial court's corrected judgment was a modified judgment, filed within the trial court's plenary power—not a judgment nunc pro tunc. *See In re Cherry*, 258 S.W.3d 328, 333 (Tex. App.—Austin 2008, orig. proceeding) (citing *State v. Bates*, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994)); *see also In re Culver*, No. 06-11-00028-CV, 2011 WL 1136788, at *1 (Tex. App.—Texarkana Mar. 29, 2011, orig. proceeding) (mem. op.).

Last, Tiede argues that, in accordance with Article 37.10(a) of the Texas Code of Criminal Procedure, the trial court was required to call the error to the jury's attention so that the jury's intent could be realized. TEX. CODE CRIM. PROC. ANN. art. 37.10(a) (West 2006). Assuming

[23]*See Herod v. State*, No. 14-12-00645-CR, 2013 WL 5760739, at *4 (Tex. App.—Houston [14th Dist.] Oct. 22, 2013, pet. ref'd) (mem. op., not designated for publication). "Although unpublished cases have no precedential value, we may take guidance from them 'as an aid in developing reasoning that may be employed.'" *Newkirk v. State*, 506 S.W.3d 188, 191 (Tex. App.—Texarkana 2016, no pet.) (quoting *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd)).

error,[24] we must next determine whether the error was harmful. *Perez v. State*, 21 S.W.3d 628 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see Tollett v. State*, 799 S.W.2d 256, 259 (Tex. Crim. App. 1990). The Texas Court of Criminal Appeals concluded that a life sentence and a sentence of ninety-nine years' imprisonment are practically equivalent and that a sentence of ninety-nine years is considered to be the lesser of the two sentences. *Tollett*, 799 S.W.2d at 259. Accordingly, we conclude that Tiede was not harmed by the failure to follow the procedure described in Article 37.10(a).

Having concluded that Tiede's sentence was not void, that the trial court properly modified the judgment to reflect the lesser sentence of ninety-nine years' imprisonment, and that Tiede was not harmed by any Article 37.10(a) error, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 19, 2017
Date Decided: August 9, 2017

Do Not Publish

[24]The Texas Court of Criminal Appeals has written:

> An incomplete or unresponsive verdict should not be received by the court. It is not only within the power, but it is the duty of the trial judge, to reject an informal or insufficient verdict, call to the attention of the jury the informality or insufficiency, and have the same corrected with their consent, or send them out again to consider their verdict.

Reese v. State, 773 S.W.2d 314, 317 (Tex. Crim. App. 1989) (citation omitted).