TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00707-CR

Devin Dasean Simmons, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT
NO. 71988-D, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

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

A jury convicted appellant Devin Dasean Simmons of the offense of aggravated robbery with a deadly weapon.[1] Following a hearing on punishment before the court, the district court rendered judgment on the verdict and sentenced Simmons to 45 years' imprisonment. In four issues on appeal, Simmons asserts that (1) the district court failed to admonish him of the sentencing consequences of his pleading true to the allegations in two enhancement paragraphs that were included in the indictment; (2) the evidence is insufficient to prove the allegations in the enhancement paragraphs; (3) his sentence of 45 years' imprisonment is "grossly disproportionate" to the offense; and (4) the district court abused its discretion in allowing a witness to invoke her privilege against self-incrimination. We will affirm the judgment of conviction.

[1] *See* Tex. Penal Code § 29.03(a)(2).

BACKGROUND

The jury heard evidence that in the early morning hours of October 16, 2013, Robert Patrick, the victim in the case, met a woman at a strip club in Killeen. Patrick testified that the woman, who went by the name "Candy" but was later identified as Gini Lee Taylor, eventually asked him for a ride home. Patrick agreed. According to Patrick, when they arrived at Taylor's apartment, she invited him inside. When he entered the residence, Patrick explained, Taylor led him to a bedroom where Patrick encountered a man, later identified as Simmons, who "came out with a pistol in his hand," hit Patrick in the head with the pistol, and told Patrick, "You thought you were going to fuck tonight, but you're going to die." Patrick testified that Simmons then ordered him to empty his pockets and that, after he complied, Simmons further ordered him to get more money from his car. Patrick explained that as he began to move out of the bedroom, Simmons fired the pistol and moved toward Patrick. As Simmons approached him, Patrick recalled, he attempted to grab the weapon away from Simmons and a struggle for the pistol ensued. During the struggle, Patrick explained, Simmons yelled at Taylor to "hit the motherfucker with something." According to Patrick, Taylor then hit him with an unidentified object, causing Patrick to become dazed and lose control of the pistol, which Taylor then took from him. At that point, Patrick recalled, Simmons instructed Taylor to put the gun to Patrick's head and Taylor complied. Simmons and Taylor then led Patrick to a couch, where Patrick sat while Taylor continued pointing the pistol at him and Simmons went outside to "get [the] chopper," which Patrick believed to be another weapon.

Patrick further testified that, as Simmons was leaving the house and Taylor was momentarily distracted by her cell phone, Patrick "took a run for the bedroom" and "heard a gun go

off." Patrick immediately realized that he had been shot but nevertheless "made it to the bedroom," broke open the window, and escaped the apartment. Patrick testified that he eventually found help and was transported to a hospital for treatment. According to Patrick, he suffered extensive injuries from the incident, including a bullet wound to his hip that "completely shattered" the bone and required "complete hip reconstruction."

Based on Patrick's testimony and other evidence, the jury found Simmons guilty of the offense of aggravated robbery as charged.[2] After Simmons pleaded true to two enhancement paragraphs alleging prior convictions for the felony offenses of burglary of a habitation and possession of a firearm by a felon, the district court rendered judgment on the verdict and sentenced Simmons to 45 years' imprisonment as noted above. This appeal followed.

ANALYSIS

Plea admonishments

Aggravated robbery is a first-degree felony offense, with a range of punishment of 5 to 99 years' imprisonment.[3] However, by pleading true to the allegations in the enhancement paragraphs, Simmons became subject to the range of punishment applicable to habitual offenders, specifically a term of life imprisonment or any term of imprisonment not more than 99 years or less

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[2] Gini Lee Taylor was also charged with aggravated robbery for her role in the offense. Taylor pleaded guilty, was sentenced to 35 years' imprisonment, and this Court affirmed her conviction on appeal. *See Taylor v. State*, No. 03-14-00300-CR, 2014 Tex. App. LEXIS 11324, at *11 (Tex. App.—Austin Oct. 14, 2014, pet. ref'd) (mem. op., not designated for publication). As we explain in more detail below, during Simmons's trial, Taylor invoked her privilege against self-incrimination and did not testify.

[3] *See* Tex. Penal Code §§ 12.32(a), 29.03(b).

than 25 years.[4] In his first issue, Simmons asserts that the district court erred in failing to admonish him that pleading true to the allegations in the enhancement paragraphs would subject Simmons to the enhanced range of punishment. As support for this contention, Simmons relies on Article 26.13(a)(1) of the Code of Criminal Procedure, which provides that, "[p]rior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of the range of the punishment attached to the offense."[5]

However, it is well established that the provisions of article 26.13, including the requirement that a defendant be admonished on the range of punishment, apply only to pleas of guilty or nolo contendere to the charged offense, not to pleas of true to allegations in enhancement paragraphs.[6] Accordingly, the district court was not required to admonish Simmons that, by pleading true to the allegations in the enhancement paragraphs, he would be subject to the range of punishment for habitual offenders.[7]

We overrule Simmons's first issue.

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[4] *See id*. § 12.42(d).

[5] Tex. Code Crim. Proc. art. 26.13(a)(1).

[6] *See Harvey v. State*, 611 S.W.2d 108, 112 (Tex. Crim. App. 1981); *Williams v. State*, 504 S.W.2d 477, 484 (Tex. Crim. App. 1974); *Crowder v. State*, 424 S.W.2d 637, 638 (Tex. Crim. App. 1968); *Brazell v. State*, 828 S.W.2d 580, 582-83 (Tex. App.—Austin 1992, pet. ref'd); *see also Cobourn v. State*, No. 05-11-00173-CR, 2013 Tex. App. LEXIS 975, at *1-2 (Tex. App.—Dallas Jan. 31, 2013, no pet.) (mem. op., not designated for publication); *Brown v. State*, No. 14-08-00614-CR, 2011 Tex. App. LEXIS 1035, at *9-10 (Tex. App.—Houston [14th Dist.] Feb. 15, 2011, no pet.) (mem. op., not designated for publication); *Jones v. State*, No. 01-09-00267-CR, 2010 Tex. App. LEXIS 10279, at *26-28 (Tex. App.—Houston [1st Dist.] Dec. 30, 2010, no pet.) (mem. op., not designated for publication).

[7] *See Harvey*, 611 S.W.2d at 112; *Brazell*, 828 S.W.2d at 582-83.

Sufficiency of evidence supporting enhancement paragraphs

The first enhancement paragraph (Paragraph II of the indictment) alleged that on December 12, 2009, "in Cause Number 62,334 in the 27th District Court of Bell County, Texas, the defendant was convicted of the felony offense of Burglary of a Habitation." The second enhancement paragraph (Paragraph III of the indictment) alleged that, "prior to the commission of the offense alleged in Paragraph II and after the conviction in Cause Number 62,334 was final, the defendant committed the felony offense of Unlawful Possession of a Firearm By a Felon" and was convicted of that offense on November 29, 2011. At the conclusion of the hearing on punishment, the district court found the allegations in both paragraphs to be true. In his second issue, Simmons asserts that the evidence is insufficient to prove the allegations in the enhancement paragraphs.

"The State has the burden of proof to show that any prior conviction used to enhance a sentence was final under the law and that the defendant was the person previously convicted of that offense."[8] Additionally, in order to establish that a defendant is subject to the punishment range for habitual offenders, as Simmons was here, the State must also prove "that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final."[9] In other words, "it must be proven that the first conviction became final, the offense leading to a later conviction was committed, the later conviction became final, and the defendant subsequently

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[8] *Donaldson v. State*, 476 S.W.3d 433, 439 (Tex. Crim. App. 2015) (citing *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007)).

[9] Tex. Penal Code § 12.42(d).

committed the offense for which he presently stands accused."[10] "If, however, a defendant pleads true to an enhancement paragraph, that relieves the State of its evidentiary burden to prove the enhancement allegations, unless the record 'affirmatively reflects' that the enhancements were improper."[11]

In this case, at the conclusion of the guilt / innocence phase of trial, after the jury had found Simmons guilty of the charged offense, the State read the enhancement paragraphs in their entirety, and Simmons pleaded true to each enhancement paragraph as follows:

> [Prosecutor]: Paragraph 2. And it is further presented in and to said Court that prior to the commission of the offense alleged in paragraph 1, on the 12th day of December, 2009, in Cause Number 62334 in the 27th District Court of Bell County, Texas, the defendant was convicted of a felony offense of burglary of a habitation.
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> [The Court]: To that paragraph, how do you plead? True or not true?
>
> [Simmons]: True.
>
> [Prosecutor]: Paragraph 3. And it is further presented in and to said Court that prior to the commission of the offense alleged in paragraph 2 and after the conviction in Cause Number 62334 was final, the defendant committed the felony offense of unlawful possession of a firearm by a felon and was convicted on the 29th day of November, 2011, in Cause Number 68529 in the 426th District Court of Bell County, Texas.

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[10] *Hopkins v. State*, 487 S.W.3d 583, 586 (Tex. Crim. App. 2016) (citing *Jordan v. State*, 256 S.W.3d 286, 290-91 (Tex. Crim. App. 2008)).

[11] *Id.* (citing *Roberson v. State*, 420 S.W.3d 832, 838 (Tex. Crim. App. 2013)). Enhancements are improper, for example, if one of the convictions on which the State relied for enhancement was a misdemeanor rather than a felony or if one of the convictions was not final at the time it was used for enhancement. *See Ex parte Rich*, 194 S.W.3d 508, 511, 513-14 (Tex. Crim. App. 2006).

[The Court]: To that paragraph, how do you plead?

[Simmons]: True.

[The Court]: Are you pleading true to each of these paragraphs freely and voluntarily?

[Simmons]: Yes.

[The Court]: Has anybody made any promises to you, forced you, threatened you, or intimidated you in any way to get you to plead true?

[Simmons]: No.

[The Court]: You are pleading true, Mr. Simmons, because you were previously convicted as alleged and for no other reason; is that correct?

[Simmons]: Yes.

A modified version of the above procedure was followed at the hearing on punishment that was held approximately two months later.[12] This time, the enhancement paragraphs were not read to Simmons in their entirety, but the district court noted the prior convictions alleged in each paragraph:

> Now, you have paragraphs 2 and 3 which allege prior convictions. In paragraph 2, it alleges that you were convicted in the 27th District Court of burglary of a habitation in 2009. Paragraph 3 alleges the unlawful possession of a firearm by a felon and that you were convicted in November of 2011 in the 426th [District Court]. So I'm going to ask you at this time: To those paragraphs how do you plead, true or not true?

Simmons answered, "I plead true." Shortly thereafter, the district court asked Simmons whether he was "pleading true to those paragraphs because you were convicted as alleged in each of those

[12] At the punishment hearing, the district court remarked on the record that it could not recall whether it had accepted Simmons's pleas at the conclusion of the guilt / innocence phase of trial, so it accepted the pleas again "just to be on the safe side."

paragraphs; is that right?" Simmons answered, "Yes, ma'am." Thus, the record reflects that Simmons pleaded true to the enhancement paragraphs, and there is nothing in the record that "affirmatively reflects" that the enhancements were improper.[13] Accordingly, on this record, we conclude that the evidence is sufficient to support the allegations in the enhancement paragraphs.[14]

Simmons contends, however, that his pleas of true were insufficient to support the enhancements because of the manner in which the district court accepted his pleas. According to Simmons, the district court should have either asked Simmons to clarify whether he was pleading true "because the entire paragraph was true," or made more specific inquiries into the facts to which

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[13] In our review of the record, we have noticed that the wording of Paragraph III of the indictment does not reflect the proper sequence of events as required by the habitual-offender statute. *See* Tex. Penal Code § 12.42(d). Paragraph III recites that the second offense (from 2011) was committed "*prior to* the commission of the offense alleged in Paragraph II" (from 2009). However, the evidence presented at trial reflects the proper sequencing. Simmons testified during the guilt / innocence phase of trial that his "first offense was burglary [of a] habitation" (the offense alleged in Paragraph II), that he "got out [in] 2010" for that offense, and that in 2011, he "got in trouble again" for the offense of "possession of a firearm" (the offense alleged in Paragraph III). Thus, the evidence presented at trial confirms that the possession offense was committed *after* the burglary offense was committed, as required by the habitual-offender statute. *See Roberson*, 420 S.W.3d at 840-41 (affirming defendant's sentence as habitual offender despite "the facially incorrect wording of the enhancement allegations in the indictment" when "the record evidence . . . reflect[ed] that the sequence of the alleged prior convictions did indeed occur in the required order"); *see also Young v. State*, 14 S.W.3d 748, 750 (Tex. Crim. App. 2000) ("Thus the sufficiency of the evidence in this context should be measured by the elements of the hypothetically correct jury charge for the enhancement, as defined by statute."); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) ("Hence, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. . . . This standard can uniformly be applied to all trials, whether to the bench or to the jury . . . .").

[14] *See Hopkins*, 487 S.W.3d at 587; *Roberson*, 420 S.W.3d at 840; *Harvey*, 611 S.W.2d at 111; *Crawford v. State*, 496 S.W.3d 334, 344 (Tex. App.—Fort Worth 2016, pet. ref'd); *Manning v. State*, 112 S.W.3d 740, 744 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd); *Harrison v. State*, 950 S.W.2d 419, 422 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd); *see also Foster v. State*, No. 03-05-00801-CR, 2007 Tex. App. LEXIS 3848, at *8-11 (Tex. App.—Austin May 17, 2007, pet. ref'd) (mem. op., not designated for publication).

Simmons was pleading true, such as whether the convictions were final and whether Simmons was the same person named in the enhancements. We first observe that Simmons did not object to the district court's procedures in accepting his pleas at any point during trial, either when the pleas were first accepted at the conclusion of the guilt / innocence phase of trial or later during the hearing on punishment. Accordingly, any error in the manner by which the district court accepted Simmons's pleas of true has been waived.[15] Moreover, even if Simmons had objected, there is nothing in this record to suggest that the district court abused its discretion or otherwise erred in the manner in which it accepted Simmons's pleas.[16]

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[15] *See* Tex. R. App. P. 33.1; *Roberson*, 420 S.W.3d at 838 n.2; *Crawford*, 496 S.W.3d at 343-44; *see also Reed v. State*, 500 S.W.2d 497, 499 (Tex. Crim. App. 1973) (observing that if appellant had objected to the trial court's procedures during punishment hearing, any "problem could have been easily remedied" at that time). *Cf. Whitney v. State*, No. 03-08-00565-CR, 2009 Tex. App. LEXIS 1639, at *2-4 (Tex. App.—Austin Mar. 6, 2009, no pet.) (mem. op., not designated for publication) (in context of probation revocation hearing, holding that by failing to object to district court's procedure, appellant failed to preserve error as to complaint that trial court accepted plea of true without "inquiring specifically what it was Appellant believed to be true").

[16] The cases to which Simmons cites in his brief do not persuade us otherwise. Simmons relies primarily on *Howard v. State*, 429 S.W.2d 155 (Tex. Crim. App. 1968), a case in which the Court of Criminal Appeals held that the evidence was insufficient to support an enhancement allegation when the record failed to include the defendant's stipulation to the allegation, and there was no other evidence in the record to support the allegation. *Id*. at 156. In this case, however, Simmons pleaded true in open court to the allegations in the enhancement paragraphs, and those pleas are reflected in the record. *Howard* is thus inapplicable here. Simmons also cites to two unpublished opinions. *See Casel v. State*, No. 07-12-0106-CR, 2012 Tex. App. LEXIS 8018, at *2-3 (Tex. App.—Amarillo Sept. 20, 2012, no pet.) (mem. op., not designated for publication); *Nabors v. State*, No. 12-00-00371-CR, 2002 Tex. App. LEXIS 4506, at *27-28 (Tex. App.—Tyler June 21, 2002, pet. ref'd) (not designated for publication). Setting aside the fact that these opinions have no precedential value, *see* Tex. R. App. P. 47.7(a), neither opinion holds or even suggests that the trial court is required to accept a defendant's pleas of true to enhancement paragraphs in a particular manner. We also note that when punishment is assessed by the court, as it was here, the procedural requirements are relaxed and the trial court is not required to even read the enhancement paragraphs to the defendant. *See Reed*, 500 S.W.2d at 499-500; *Lopez v. State*, 452 S.W.3d 425, 428-29 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

We overrule Simmons's second issue.

Length of sentence

In his third issue, Simmons asserts that his sentence of 45 years' imprisonment is "grossly disproportionate" to the offense that he committed.[17] However, this complaint was not raised in the court below, either at the time Simmons was sentenced or in a motion for new trial. Accordingly, Simmons has failed to preserve this issue for review.[18]

Moreover, even if this issue had been preserved, we could not conclude on this record that Simmons's sentence was "grossly disproportionate" to the offense. Aggravated robbery is a first-degree felony offense, with a punishment range of 5 to 99 years' imprisonment, and a range of 25 years to life imprisonment when considering Simmons's status as a habitual offender. According to the evidence presented, this was a case in which the victim was robbed, assaulted, threatened, held against his will at gunpoint, told that he was "going to die" that night, and was shot with a firearm as he tried to escape, resulting in serious, life-threatening injuries. Additionally, the evidence tended to show that this was a premeditated crime, with Taylor luring the victim to her residence and Simmons waiting inside to rob and assault him. As the State argued during sentencing, "This is not

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[17] *See Graham v. Florida*, 560 U.S. 48, 59-60 (2010); *State v. Simpson*, 488 S.W.3d 318, 322-23 (Tex. Crim. App. 2016).

[18] *See Burt v. State*, 396 S.W.3d 574, 577 & n.4 (Tex. Crim. App. 2013); *Battle v. State*, 348 S.W.3d 29, 30-31 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Russell v. State*, 341 S.W.3d 526, 527-28 (Tex. App.—Fort Worth 2011, no pet.); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *see also King v. State*, No. 03-12-00776-CR, 2013 Tex. App. LEXIS 4528, at *3-4 (Tex. App.—Austin Apr. 10, 2013, pet. ref'd) (mem. op., not designated for publication).

a spontaneous crime. It's a prepared crime. But for the grace of God and poor marksmanship, we don't have a death in this case and [that] would have been entirely different." Moreover, Simmons had two prior convictions for the felony offenses of burglary of a habitation and possession of a firearm by a felon. Considering these and other circumstances, we could not conclude that a sentence of 45 years' imprisonment is "grossly disproportionate" to the offense committed in this case.[19]

We overrule Simmons's third issue.

Privilege against self-incrimination

In his fourth issue, Simmons asserts that the district court abused its discretion in allowing Gini Taylor, the woman who had pleaded guilty to committing the offense with Simmons, to invoke her Fifth Amendment privilege against self-incrimination during Simmons's trial.[20] The record reflects that, in a hearing outside the presence of the jury, Taylor invoked her privilege as follows:

[Defense counsel]: Ma'am, what is your name?

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[19] *See Simpson*, 488 S.W.3d at 323 ("To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses."); *see also King*, 2013 Tex. App. LEXIS 4528, at *7 (observing that "aggravated robbery with a deadly weapon . . . carries with it the implicit threat and risk of death or serious bodily injury" and concluding that 60-year sentence was not grossly disproportionate to offense).

[20] *See* U.S. Const. amend. V; *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001); *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

[Witness]: Gini Taylor.

. . . .

[Defense counsel]: And it's my understanding that you were involved in an aggravated robbery charge?

[Witness]: No. I choose to use my Fifth Amendment and not testify.

. . . .

[The Court]: All right. And your counsel, Mr. Kuchera is present in court. He's been appointed to represent you on appeal?[21]

[Witness]: Uh-huh.

[The Court]: Is that a yes?

[Witness]: Yes, ma'am.

[The Court]: And you've had the opportunity to talk with counsel and follow his advice?

[Witness]: Yes, ma'am.

[The Court]: All right. Mr. Kuchera is present. State?

[Prosecutor]: No questions, Judge.

[The Court]: All right. Anything else?

[Defense counsel]: Just a couple more questions. Ms. Taylor, have you written letters to my client since?

[Witness]: Yes, sir.

[Defense counsel]: And in those letters, did you discuss certain things with him in regards to what your testimony would be?

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[21] At the time of Simmons's trial, Taylor's appeal of her conviction was pending before this Court.

[Witness]: I choose not to talk about any of that, sir.

[Defense counsel]: And so you haven't included any letters, in fact, that you acted on your own and that it was not at any direction or command or anything by my client, by Devin?

[Witness]: I choose not to speak on that.

[Defense counsel]: That's all I have, Your Honor.

According to Simmons, Taylor waived her privilege against self-incrimination when she disclosed that she had written letters to Simmons, and the district court should have required her to testify as to the contents of the letters.[22]

Simmons is raising this complaint for the first time on appeal. At the time Taylor invoked her privilege and refused to testify as to the contents of the letters, "[t]here was no objection made nor any attempt to show that the witness had improperly invoked or waived [her] Fifth Amendment privilege."[23] Moreover, "[t]he record fails to show that a demand was made to the Court to require the witness to testify."[24] The Court of Criminal Appeals has held that when "the appellant made no claim at the time of trial that the witness had waived [her] Fifth Amendment

[22] *See Rogers v. United States*, 340 U.S. 367, 373-74 (1951) ("Disclosure of a fact waives the privilege as to details."); *see also Brown v. Walker*, 161 U.S. 591, 597 (1896) ("[I]f the witness himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.").

[23] *Brown v. State*, 500 S.W.2d 653, 655 (Tex. Crim. App. 1973).

[24] *Id*.

privilege, it may not be raised for the first time on appeal."[25] Accordingly, we conclude that Simmons has failed to preserve this issue for review.[26]

Additionally, even if Simmons had objected below on the ground that Taylor had waived her privilege, the district court would not have abused its discretion in overruling such an objection. The rule allowing for a finding that the witness has waived the privilege against self-incrimination is designed to "avoid distortion of the evidence" and to prevent the witness from providing an incomplete or "partial account" of the facts to the jury.[27] But here, Taylor's statement that she had sent letters to Simmons was made in a hearing outside the presence of the jury (as was her invocation of the privilege). Thus, even if Simmons had objected, the district court would not have abused its discretion in overruling the objection on the ground that "[t]he jury could not have been misled by [the witness's] partial disclosure because the jury did not hear it."[28]

We overrule Simmons's fourth issue.

CONCLUSION

We affirm the judgment of conviction.

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[25] *Id*.

[26] *See id*.; *see also* Tex. R. App. P. 33.1; *Cadoree v. State*, 331 S.W.3d 514, 526 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *Chennault v. State*, 667 S.W.2d 299, 302 (Tex. App.—Dallas 1984, pet. ref'd).

[27] *See Rogers*, 340 U.S. at 371; *Grayson v. State*, 684 S.W.2d 691, 695 (Tex. Crim. App. 1984).

[28] *Grayson*, 684 S.W.2d at 695.

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Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed

Filed: March 23, 2017

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