TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00128-CR
NO. 03-16-00129-CR

Roderick Price, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 450TH JUDICIAL DISTRICT
NOS. D-1-DC-15-203177 & D-1-DC-15-203178,
THE HONORABLE DON JEFFERY CLEMMER, JUDGE PRESIDING

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

Appellant Roderick Price was convicted by a jury of robbery, *see* Tex. Penal Code § 29.02(a), and evading arrest or detention with a prior evading arrest or detention conviction, *see id.* § 38.04(a), (b)(1). At trial, appellant pled guilty to the evading offense but submitted the issue of his guilt for the robbery offense to a jury. In addition, appellant pled true to the enhancement paragraphs alleged in each of the indictments, subjecting him to punishment as a habitual offender for both offenses.[1] *See id.* §§ 12.42(d); 12.425(b). The jury found appellant guilty of both offenses, found all of the enhancement paragraphs to be true, and assessed appellant's punishment at confinement in the Texas Department of Criminal Justice for 40 years for the robbery, *see id.*

[1] The six enhancement paragraphs, identical in both indictments, alleged ten prior felony convictions: four thefts, two robberies, three burglaries of a building, and one burglary of a habitation.

§ 12.42(d), and 20 years for the evading arrest or detention, *see id.* §§ 12.33, 12.425(b). On appeal, appellant challenges the sufficiency of the evidence to support his robbery conviction. We find no reversible error. However, through our own review of the record, we have found non-reversible error in the written judgments of conviction. We will modify the judgments to correct the errors and, as modified, affirm the trial court's judgments of conviction.

BACKGROUND[2]

In the early morning hours of May 30, 2017, appellant stole money during a "snatch and grab" on the cash register of a Walgreens in Austin. The night shift clerk was injured during the incident when appellant pushed him to get to the cash drawer and during the subsequent struggle over the cash drawer. After appellant overcame the clerk's resistance and took the money, he ran out of the store to a Jeep Cherokee waiting in the parking lot. The Jeep, being driven by someone else, sped away after appellant got in. Police subsequently located the Jeep, attempted to detain it, and a high speed chase ensued. The chase ended when the Jeep crashed. Appellant fled the crash scene on foot but was apprehended by police.

[2] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

DISCUSSION

In his sole point of error, appellant challenges the sufficiency of the evidence supporting his conviction for robbery, asserting that the evidence is insufficient to support a finding that he committed the offense with the requisite culpable mental state.

Sufficiency of the Evidence

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In our sufficiency review we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *see Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider only whether the factfinder reached a rational decision. *See Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (observing that reviewing court's role

on appeal "is restricted to guarding against the rare occurrence when a fact finder does not act rationally") (quoting *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010)).

To determine whether the State has met its evidentiary burden of proving a defendant guilty beyond a reasonable doubt, we compare the elements of the offense as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)); *see Morgan*, 501 S.W.3d at 89. "A hypothetically correct jury charge is one that 'accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Jenkins*, 493 S.W.3d at 599 (quoting *Thomas*, 444 S.W.3d at 8, in turn quoting *Malik*, 953 S.W.2d at 240); *see Morgan*, 501 S.W.3d at 89. The law as authorized by the indictment consists of the statutory elements of the charged offense as modified by the factual details and legal theories contained in the indictment. *Patel v. State*, No. 03-14-00238-CR, 2016 WL 2732230, at *2 (Tex. App.—Austin May 4, 2016, no pet.) (mem. op., not designated for publication); *see Jenkins*, 493 S.W.3d at 599; *Thomas*, 444 S.W.3d at 8.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. art. 38.04; *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we must defer to the credibility and weight determinations of the factfinder.

Cary v. State, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016); *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015). In addition, we must "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 198 (2015) (quoting *Clayton*, 235 S.W.3d at 778). When the record supports conflicting reasonable inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that resolution. *Cary*, 507 S.W.3d at 757; *Blea*, 483 S.W.3d at 33; *Murray*, 457 S.W.3d at 448–49.

Because factfinders are permitted to make reasonable inferences, "[i]t is not necessary that the evidence directly proves the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone can be sufficient to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)); *see Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); *Nowlin*, 473 S.W.3d at 317. The standard of review is the same for direct and circumstantial evidence cases. *Jenkins*, 493 S.W.3d at 599; *Nowlin*, 473 S.W.3d at 317; *Dobbs*, 434 S.W.3d at 170.

As charged in this case, a person commits robbery if, in the course of committing theft and with the intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another. Tex. Penal Code § 29.02(a)(1). Theft is the unlawful appropriation of property with the intent to deprive the owner of the property. *Id.* § 31.03(a). Appropriation of property is unlawful if it is without the owner's effective consent. *Id.*

§ 31.03(b)(1). A person acts "intentionally, or with intent" with respect to a result of his conduct when it is his conscious objective or desire to cause the result.[3] *Id.* § 6.03(a). A person acts "knowingly, or with knowledge" with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). A person acts "recklessly, or is reckless" with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. *Id.* § 6.03(c).

The evidence at trial—which included the video from the Walgreens security camera—showed that appellant walked into the Walgreens at approximately 3:56 a.m. Saturday, May 30, 2015. Quentin Taylor, the night shift clerk was working the register at the front of the store. Appellant asked Taylor if he could purchase a snack for less than a dollar. Taylor directed appellant

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[3] The Penal Code delineates three "conduct elements" that may be involved in an offense: (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct. *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994); *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989); *see* Tex. Penal Code § 6.03. An offense "'may contain any one or more of these "conduct elements" which alone or in combination form the overall behavior which the Legislature has intended to criminalize, and it is those essential "conduct elements" to which a culpable mental state must apply.'" *Cook*, 884 S.W.2d at 487 (quoting *McQueen*, 781 S.W.2d at 603); *see Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011) (examining three general categories of crime based on conduct elements: (1) "result of conduct" offenses, which focus on product (or result) of certain conduct; (2) "nature of conduct" offenses, which proscribe certain acts or conduct, regardless of any result that might occur; and (3) "circumstances of conduct" offenses, which focus on circumstances surrounding conduct that criminalize otherwise innocent behavior). The offense of robbery causing bodily injury involves all three conduct elements: (1) causation of bodily injury, a result of the conduct; (2) commission in the course of committing theft, the circumstances surrounding conduct; and (3) unlawful appropriation of property, the nature of conduct. *Barnes v. State*, 56 S.W.3d 221, 234 (Tex. App.—Fort Worth 2001, pet. ref'd); *Ash v. State*, 930 S.W.2d 192, 195 (Tex. App.—Dallas 1996, no pet.). The requisite culpable mental state for robbery causing bodily injury—as expressed in the statute and as alleged in the indictment here (intentionally, knowingly, or recklessly)—relates to the result of the conduct, that is, the causing of bodily injury.

to some candy on sale and, after seeing that appellant was still short on money, offered to cover the deficit. Taylor scanned the candy item. Appellant tendered the coins he had. Taylor added a quarter from the "take a penny, leave a penny" collection and entered the total amount on the touch screen of the computer terminal.[4] With the addition of the quarter, the total amount was more than the cost of the candy so coins were deposited in the change dispenser and the cash drawer under the counter opened. Taylor reached across the counter, leaning over the gap of a recessed area for bagging purchased items, to collect the dispensed change. As he did so, appellant pushed Taylor out of the way to grab the cash from the drawer. Due to his unbalanced position (because he was leaning across the counter and over the gap), Taylor fell back when appellant pushed him and his back struck the computer monitor. He immediately recovered and attempted to prevent appellant from taking the money from the cash drawer. The two struggled over the cash drawer—physically "tussling" for approximately 13 seconds—until appellant overcame Taylor's resistance, took the money, and ran out of the store. Taylor chased appellant out of the store and saw him leave in the waiting Jeep Cherokee. Taylor then went back inside the store and called 911 to report the incident to police.

The responding patrol officer from the Austin Police Department made contact with Taylor at the store and observed visible injuries on Taylor's arm. Specifically, the officer noted a large contusion (a red mark about one inch wide and two or two-and-a-half inches long) and a "long scratch" on Taylor's left forearm. The officer testified that initially, Taylor told him that "there was

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[4] Taylor explained that

> [w]henever a customer leaves their change or say they don't want the change, we collect the change for anybody that's shorthanded on theirs. And at the end of the night, we put it all back in the drawer, in the till.

a little bit of pain associated with the scratch" but later also indicated that "his back started hurting when the adrenaline [began] wearing off." The officer took photographs of Taylor and his injuries, which were admitted into evidence.

After his shift was over, Taylor sought medical attention at the Cedar Park Family Emergency Room because his back and right wrist were hurting. After X-rays on both his back and wrist revealed no fractures, Taylor was diagnosed with mild back pain and a sprained wrist. He was given a prescription for a pain medicine and a splint for his wrist. The medical records of Taylor's ER visit were admitted into evidence. Taylor testified that his back hurt "for a few days" and his wrist hurt "almost a week." He was unable to work at his second job during that time because it required him to repeatedly use his sprained wrist.

In his sufficiency challenge, appellant argues that the State failed to prove that he acted with the requisite culpable mental state. Specifically, he claims that the evidence does not support a finding that he acted recklessly because "the injuries were not foreseeable from the act of grabbing money and running way."

The State may prove a defendant's criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). The requisite culpable mental state is almost always proved by circumstantial evidence. *Stobaugh v. State*, 421 S.W.3d 787, 862 (Tex. App.—Fort Worth 2014, pet. ref'd); *see Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991), *overruled on other grounds by Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992) ("[M]ental culpability is of such a nature that it generally must be inferred from the circumstances

under which a prohibited act or omission occurs."). The Court of Criminal Appeals has explained that the defendant's state of mind is a question of fact that must be determined by the jury, and in doing so the jury may infer the culpable mental state from any facts in evidence which tend to prove its existence. *Brown v. State*, 122 S.W.3d 794, 800 (Tex. Crim. App. 2003); *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). Accordingly, the culpable mental state can be inferred from circumstantial evidence such as the defendant's acts, words, and conduct. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Hart*, 89 S.W.3d at 64; *see, e.g.*, *Laster*, 275 S.W.3d at 524 (concluding that jury could reasonably infer intent to inflict bodily injury from defendant's conduct because "[o]ne's acts are generally reliable circumstantial evidence of one's intent") (quoting *Rodriguez v. State*, 646 S.W.2d 524, 527 (Tex. App.—Houston [1st Dist.] 1982, no pet.)). In addition, in assaultive situations, the culpable mental state can be inferred from the extent of the injuries to the victim, the method used to produce the injuries, and the relative size and strength of the parties. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995); *Duren v. State*, 87 S.W.3d 719, 724 (Tex. App.—Texarkana 2002, pet. struck).

In this case, the evidence in the record supports the inference that appellant caused bodily injury to Taylor with the requisite culpable mental state, as expressed in the statute and alleged in the indictment.

Bodily injury is broadly defined in the Penal Code as "physical pain, illness, or any impairment of physical conduction." Tex. Penal Code § 1.07(a)(8). This definition encompasses even relatively minor physical contact if it constitutes more than offensive touching. *Laster*, 275 S.W.3d at 524; *see Garcia v. State*, 367 S.W.3d 683, 688 (Tex. Crim. App. 2012) ("Any

physical pain, however minor, will suffice to establish bodily injury."). As the Court of Criminal Appeals noted more than twenty-five years ago, in the context of robbery, the proof of bodily injury "is not dependent upon the severity of the 'violence' used, so long as some resulting 'physical pain, illness, or any impairment of physical condition' can be identified." *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989). Consequently, "[t]he threshold of proof necessary to support a jury finding of an awareness that such a result is reasonably certain to occur is concomitantly low." *Id.*

Here, the record reflects that appellant made significant and ongoing physical contact with Taylor during the encounter. The video shows Taylor leaning across the counter over the gap of the recessed area to collect the dispensed change. At this point, when he was precariously balanced, appellant pushed him from underneath. As Taylor described, "[appellant] shoved me as he was going for the cash drawer." He later clarified, "[Appellant] pushed me. He shoved me with his shoulder." The ER medical records show that he reported to the medical personnel that "the robber pushed him and he hit his back against the cash register." The record further demonstrates that appellant then continued using force against Taylor as he tried to get the money from the cash drawer. Taylor testified that appellant kept "bumping" him and "pushing back" as Taylor tried to close the drawer. He explained that appellant touched him directly during the tussle, not just the cash drawer. He said that appellant "flipped [Taylor's] hands off [appellant's] hands" while they were "tussling" as appellant tried to get Taylor's hands off of him so he could grab the money. Taylor confirmed that appellant directly "grabbed [him]" during the encounter.

In his brief, appellant argues that the record shows only a grab for the cash and "incidental" contact with the clerk. However, Taylor's testimony contradicts that argument.

Moreover, the video of the encounter depicts the physical contact appellant made with Taylor, which lasted approximately 13 seconds and involved constant pushing and continued struggling. In fact, at one point it appears that appellant is using his feet as leverage during the physical "tussle" to overcome Taylor's resistance. From this evidence, the jury could reasonably find that this "violence" was clearly perpetrated against Taylor "for the purpose of preventing or overcoming resistance to theft," *see id.*, and was not incidental. The jury, as fact finder, was entitled to construe all of the evidence and determine the character of the physical contact appellant made with Taylor and whether appellant acted with the requisite culpable mental state when he engaged in that physical contact.

In assessing the legal sufficiency of the evidence, the reviewing court must "give deference to 'the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Jenkins*, 493 S.W.3d at 599 (citing *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 318–19)). Furthermore, we must be mindful that jurors are free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence. *See Boston v. State*, 373 S.W.3d 832, 837 (Tex. App.—Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013); *Eustis v. State*, 191 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). In robbery cases such as this, a jury may reasonably infer from the force used in the assault that the defendant was aware his conduct was reasonably certain to cause physical pain and bodily injury, satisfying the requisite culpability needed to constitute the offense of robbery. *See Lane*, 763 S.W.2d at 787–88. From the force appellant used against Taylor, the jury could have reasonably inferred that appellant

was aware that pushing Taylor when he was leaning over off-balance and tussling with him during the struggle over the cash drawer—repeatedly pushing him, bumping him, and grabbing his hands—was reasonably certain to inflict pain and therefore cause bodily injury to Taylor. Thus, the jury could have reasonably inferred that appellant acted knowingly. *See id.* at 788 (concluding that "the jury could have reasonably inferred from the force in appellant's conduct, namely, twisting [the victim's] wrists to obtain her wallet, that he was at the very least aware that his conduct was reasonably certain to cause her physical pain, and hence, bodily injury"); *Moss v. State*, No. 05-01-00106-CR, 2002 WL 216121, at *2–3 (Tex. App.—Dallas Feb. 13, 2002, pet. ref'd) (not designated for publication) (jury could have reasonably found that defendant intentionally or knowingly caused bodily injury to victim where he grabbed victim's purse, struggled with her, pushing her back and forth as she tried to retain possession of it, before successfully wrestling purse away); *Matlock v. State*, 20 S.W.3d 57, 62 (Tex. App.—Texarkana 2000, pet. ref'd) (evidence sufficient to show that appellant acted at least knowingly in causing victim's injuries; rational trier of fact could have found that appellant was at least aware that pulling lottery dispenser away from victim could cause her bodily injury); *see also Cano v. State*, 614 S.W.2d 578, 579 (Tex. Crim. App. 1981) (concluding evidence was sufficient to show appellant knowingly or intentionally caused bodily injury to victim where he pushed victim down while grabbing her purse); *Carroll v. State*, No. 01-13-00430-CR, 2014 WL 4219552, at *4–5 (Tex. App.—Houston [1st Dist.] Aug. 26, 2014, no pet.) (mem. op., not designated for publication) (jury could have reasonably found that defendant, at very least, knowingly caused bodily injury to victim when, in effort to escape with victim's SUV, defendant struggled with her and ultimately pushed her down); *Coffee v. State*, No. 07-06-00015-CR,

2008 WL 215728, at *5–6 (Tex. App.—Amarillo Jan. 25, 2008, no pet.) (mem. op., not designated for publication) (jury rationally could infer that defendant acted with awareness that his conduct was reasonably certain to cause bodily injury to victim where defendant engaged in struggle with victim to escape with stolen property and victim sustained injuries); *Henry v. State*, 800 S.W.2d 612, 614–15 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (concluding evidence was sufficient to show appellant acted either intentionally or knowingly when he made physical contact ("a push, a strike, or a punch") with store manager who was trying to prevent defendant from leaving with stolen property); *Candelaria v. State*, 776 S.W.2d 741, 743 (Tex. App.—Corpus Christi 1989, pet. ref'd) (rational factfinder could conclude that defendant was aware that his conduct in pushing store manager into door while trying to flee was reasonably certain to cause store manager bodily injury).

Because we conclude that the evidence is sufficient to show that appellant knowingly caused bodily injury to Taylor, we reject appellant's claim that the evidence is insufficient to show that he acted recklessly. *See Contreras v. State*, 312 S.W.3d 566, 585 (Tex. Crim. App. 2010) ("Proof of one of the four culpable mental states recognized in Chapter 6 of the Penal Code necessarily suffices to prove any lesser culpable mental state recognized in that chapter.") (citing Tex. Penal Code § 6.02(d) (ranking, from highest to lowest, culpable mental states of intentional, knowing, reckless, and criminal negligence)); *see, e.g.*, *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008) (concluding that because Penal Code explicitly states that proof of greater culpability is also proof of any lesser culpability, it would not matter if jurors were not unanimous as to culpable mental state); *Flores v. State*, 245 S.W.3d 432, 440 (Tex. Crim. App. 2008) (noting that "proof of intent would, as a matter of law, establish recklessness as well"). Further, because the

evidence supports a finding that appellant knowingly caused bodily injury to Taylor, the evidence is sufficient to support appellant's conviction for robbery. *See Wooten v. State*, No. 07-09-00275-CR, 2011 WL 382587, at *4 (Tex. App.—Amarillo Feb. 7, 2011, no pet.) (mem. op., not designated for publication) (because statute authorizes three culpable mental states disjunctively, proof of any one of the three is sufficient to support conviction); *Perez v. State*, 704 S.W.2d 499, 501 (Tex. App.—Corpus Christi 1986, no pet.) (same); *Harris v. State*, Nos. 14-94-00647-CR & 14-94-00648-CR, 1999 WL 441893, at *5 (Tex. App.—Houston [14th Dist.] July 1, 1999, no pet.) (mem. op., not designated for publication) (same). We overrule appellant's sole point of error.

Error in Written Judgments

On review of the record, we observe that both written judgments of conviction contain non-reversible clerical errors.

First, the trial court's written judgment of conviction for robbery states that appellant was convicted of a first degree felony. Appellant was convicted of robbery, which is a second degree felony, *see* Tex. Penal Code 29.02 (b), and pled true to all of the enhancement paragraphs in the indictment. Section 12.42 of the Penal Code sets forth enhanced punishment ranges for those convicted of first, second, or third degree felonies (non-state jail felonies) who are repeat or habitual offenders. *See id.* § 12.42. Under subsection (d) of that statute,

> [I]f it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) 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, on

> conviction the defendant 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 25 years.

Id. § 12.42(d). The enhancement paragraphs in the indictment, to which appellant pled true, included more than two sequential convictions for felonies other than other than unaggravated state jail felonies.[5] Thus, section 12.42(d) applied, and appellant was punished as a habitual offender. However, the punishment range, not the degree of offense, was correctly enhanced to that of a habitual offender. Although section 12.42(d) allows for the *punishment* of, in this instance, a second degree felony to be increased to that of a habitual offender, it does not change the *classification or level* of the offense to a first degree felony. *See Ford v. State*, 334 S.W.3d 230, 234 (Tex. Crim. App. 2011) (noting Court of Criminal Appeals' prior recognition "that Penal Code Section 12.42 increases the range of punishment applicable to the primary offense; it does not increase the severity level or grade of the primary offense") (citing *State v. Webb*, 12 S.W.3d 808, 811 n.2 (Tex. Crim. App. 2000)); *see also Ex parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012) (drawing distinction between "enhancing the level of the offense and enhancing the level of punishment"). Thus, the trial court's judgment of conviction for robbery, which states that the offense is a first degree felony, is erroneous. The judgment should reflect that appellant was convicted of a second degree felony.

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[5] Whether or not a state jail felony offense is aggravated or unaggravated depends upon whether the offense is punishable under subsection 12.35(a), reserved for unaggravated state jail offenses, or punishable under subsection 12.35(c), reserved for aggravated state jail offenses. *See State v. Webb*, 12 S.W.3d 808, 811–12 (Tex. Crim. App. 2000).

Second, the trial court's written judgment of conviction for evading arrest or detention states that the "Statute for Offense" is "38.04(b)(1) Penal Code." This statutory provision enhances a misdemeanor evading arrest or detention offense to a state jail felony if a defendant has a prior conviction for evading arrest or detention, which appellant does so this provision applies. However, the applicable statutory provisions for the offense as alleged in the indictment here also include section 38.04(a) of the Penal Code, the statutory provision that defines the offense of evading arrest or detention. *See* Tex. Penal Code § 38.04(a).

Finally, the trial court's written judgment of conviction for evading arrest or detention states that appellant was convicted of a second degree felony. Appellant pled guilty to, and the jury found appellant guilty of, evading arrest or detention with a prior conviction for evading arrest or detention, a state jail felony. *See id.* § 38.04(a), (b)(1). Section 12.35(a) of the Penal Code sets forth the punishment for an unaggravated state jail felony. *See id.* § 12.35(a). However, section 12.425 of the Penal Code sets forth enhanced punishment ranges for those convicted of state jail felonies who are repeat or habitual offenders. *See id.* § 12.425. Under subsection (b) of that statute,

> If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies other than a state jail felony punishable under Section 12.35(a), and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a felony of the second degree.

Id. § 12.425(b). Once again, appellant pled true to all of the enhancement paragraphs in the indictment, which included more than two sequential convictions for felonies other than unaggravated state jail felonies. Thus, section 12.425(b) applied in the evading arrest or detention

case, and appellant was punished for a second degree felony. However, once again, the punishment range, not the degree of offense, was correctly enhanced to that of a second degree felony. We note that the language used in section 12.425(b) is similar to the language used in section 12.42(d), the habitual offender provision discussed above. *Compare id.* § 12.425(b) ("If it is shown on the trial of [an unaggravated] state jail felony" that the defendant has two prior sequential felony convictions, "on conviction the defendant shall be punished for a felony of the second degree."), *with id.* § 12.42(d) ("[I]f it is shown on the trial of a felony offense [other than an unaggravated state jail felony]" that the defendant has two prior sequential felony convictions, "on conviction the defendant 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 25 years."). Thus, as with section 12.42(d), although section 12.425(b) allows for the *punishment* of a state jail felony to be increased to that of a second degree felony, it does not change the *classification or level* of the offense to a second degree felony. *See Ford*, 334 S.W.3d at 234; *Reinke*, 370 S.W.3d at 389. Accordingly, the trial court's judgment of conviction for evading arrest or detention, which states that the offense is a second degree felony, is erroneous. The judgment should reflect that appellant was convicted of a state jail felony.

This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 43.2(b) (authorizing court of appeals to modify trial court's judgment and affirm it as modified); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (Texas Rules of Appellate Procedure empower courts of appeals to reform judgments). Accordingly, we modify the judgment of conviction for robbery to reflect that the "Degree of Offense" is "2nd Degree Felony." We modify the judgment of conviction for evading

arrest or detention to reflect that the "Statute for Offense" is "38.04(a), (b)(1) Penal Code" and that the "Degree of Offense" is "State Jail Felony."

CONCLUSION

Having concluded that the evidence is sufficient to support appellant's conviction for robbery but that the written judgment for that offense contains non-reversible error, we modify the trial court's judgment of conviction for robbery to reflect that appellant was convicted of a second degree felony and affirm that judgment as modified. We modify the trial court's judgment of conviction for evading arrest or detention to state that the "Statute for Offense" is "38.04(a), (b)(1) Penal Code" and to reflect that appellant was convicted of a state jail felony and affirm that judgment as modified.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Modified and, as Modified, Affirmed

Filed: April 20, 2017

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