TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00671-CR

Joshua Moreno, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2016-157, HONORABLE JACK H. ROBISON, JUDGE PRESIDING

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

Joshua Moreno was charged with possession of a controlled substance (methamphetamine) with intent to deliver in an amount between 4 and 200 grams. *See* Tex. Health & Safety Code §§ 481.102(6) (listing methamphetamine as substance included in "Penalty Group 1"), .112(a), (d) (providing that person commits offense by possessing "with intent to deliver a controlled substance listed in Penalty Group 1" and that offense is first-degree felony if amount of controlled substance is between 4 and 200 grams). After a jury had been selected, Moreno pleaded guilty to the offense. At the conclusion of the punishment hearing, the jury determined that Moreno should be imprisoned for 18 years, and the district court rendered its judgment of conviction in accordance with the jury's recommendation. *See* Tex. Penal Code § 12.32 (listing permissible punishment range for first-degree felony). In a single issue on appeal, Moreno contends that the district court failed to properly admonish him "on the deportation consequences of his plea of guilty." We will affirm the district court's judgment of conviction.

DISCUSSION

As set out above, Moreno contends that the district court erred by failing to properly admonish him. In its appellee's brief, the State agrees that the district court erred by failing to provide the admonishment at issue, but the State argues that the error was harmless.

Article 26.13 of the Code of Criminal Procedure lists specific admonishments that must be given to a defendant before a trial court accepts his guilty plea. *See* Tex. Code Crim. Proc. art. 26.13(a). Of significance to this case, the Code requires a trial court to admonish a defendant of "the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." *Id.* art. 26.13(a)(4). In addition, the Code explains that "substantial compliance" in admonishing a defendant "is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court." *Id.* art. 26.13(c). "A trial court errs . . . when it does not substantially comply with" the admonishment requirements. *Stevens v. State*, 278 S.W.3d 826, 828 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

"A violation of article 26.13 falls within the non-constitutional harm analysis of Texas Rule of Appellate Procedure 44.2(b)." *Id.* Under that Rule, appellate courts must disregard non-constitutional errors that do "not affect substantial rights." Tex. R. App. P. 44.2(b). "If the error affected substantial rights, then, it is not harmless." *VanNortrick v. State*, 227 S.W.3d 706, 708 (Tex. Crim App. 2007). In the context of a failure to give a required admonition, reviewing courts "must conduct an independent examination of the record as a whole" and determine whether they

"'have a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him.'" *Id.* at 709 (quoting *Anderson v. State*, 182 S.W.3d 914, 919 (Tex. Crim. App. 2006)). In addition, reviewing "courts should draw reasonable inferences from facts in the record when conducting a harm analysis due to a trial court's failure to admonish a defendant about the consequences of pleading guilty." *Id.* at 710. If the record establishes that a defendant is a United States citizen, and thus "not subject to deportation, the threat of which could not have influenced that defendant's decision to plead guilty," "the trial court's failure to admonish him on the immigration consequences of his guilty plea is harmless error." *Id.* at 709; *see also* U.S. Const. amend. XIV, § 1 (providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"); *Reyes v. State*, No. 03-15-00233-CR, 2017 WL 1130373, at *9 (Tex. App.—Austin Mar. 23, 2017, no pet. h.) (mem. op., not designated for publication) (stating that "[e]vidence showing that a defendant was born in the United States is sufficient to establish citizenship so that a failure to admonish regarding the possible deportation and immigration consequences of a guilty plea is harmless error"). "The proof of citizenship . . . need not be conclusive." *Hines v. State*, 396 S.W.3d 706, 709 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

During the trial, Moreno entered a guilty plea. When determining whether to accept the plea, the district court asked whether Moreno was entering his plea "freely, knowingly, intelligently and voluntarily after thoroughly conferring with [his] lawyers," and Moreno answered, "Yes, [y]our Honor." However, no admonishment regarding potential deportation consequences was given. Accordingly, the district court failed to comply with the requirements of article 26.13. *See* Tex. Code Crim. Proc. art. 26.13.

Having determined that the district court erred by failing to provide the statutory admonishment, we must now determine if the error was harmless. *See* Tex. R. App. P. 44.2(b). During the punishment hearing, various members of Moreno's family testified that Moreno had lived in California and Florida as well as in Texas, and no testimony was presented indicating that Moreno was born in another country or that he had ever lived in another country. On the contrary, Moreno's aunt, Julia Villareal, testified that when Moreno "was first born, he lived in California" and then moved to Texas with his family when he was young. In addition, during the punishment hearing, Moreno's attorney affirmatively referred to Moreno as "an American citizen" when questioning one of the witnesses about conditions of community supervision.

In arguing in his brief that the exchanges above are insufficient to support an inference that he is a citizen, Moreno asserts that a comment by his trial attorney cannot support an inference that he is a citizen because the comment is not evidence. Further, Moreno asserts that his aunt's testimony did not explicitly state that he was born in California and was instead a reference "to a period of time and not a specific event."

When discussing what may support an inference regarding citizenship, the court of criminal appeals has explained that there is no "requirement that support for an inference regarding citizenship be direct evidence" and that although "[s]tatements made by the attorneys are not 'evidence' . . .[,] they are references found in the record that can support an inference." *See Fakeye v. State*, 227 S.W.3d 714, 716 (Tex. Crim. App. 2007) (determining that statements made in motion in limine may be considered even though statements are not technically evidence); *see also Burnett v. State*, 88 S.W.3d 633, 639-41 (Tex. Crim. App. 2002) (deciding that error in failing to

admonish defendant regarding punishment range was harmless and relying on statements made by prosecutor and defendant's attorney regarding punishment range before defendant entered plea when determining that error was harmless).[1] Moreover, although Moreno's aunt did not utter the

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[1] In his brief, Moreno contends that the comment by his attorney was a question posed to a witness and then points to several cases suggesting that questions by attorneys are not evidence. *See Madden v. State*, 242 S.W.3d 504, 514 (Tex. Crim. App. 2007) (explaining that "[t]he cross-examiner cannot create a factual dispute for purposes of an Article 38.23(a) [jury] instruction merely by his questions" because "[i]t is only the answers that are evidence and may create a dispute"); *Johnston v. State*, 230 S.W.3d 450, 456 n.6 (Tex. App.—Fort Worth 2007, no pet.) (addressing factual sufficiency of evidence of conviction and explaining that appellate court did not consider counsel's question because question was not evidence); *Wiggins v. State*, 778 S.W.2d 877, 890 (Tex. App.—Dallas 1989, pet. ref'd) (deciding whether "'have you heard' testimony' . . . was properly admitted to test the witness's opinion of [defendant]'s honesty" and noting that "answers, not questions, constitute evidence"); *Wells v. State*, 730 S.W.2d 782, 786 (Tex. App.—Dallas 1987, pet. ref'd) (considering whether admission of extraneous-offense evidence was unduly prejudicial and explaining that "[q]uestions put to a witness are not evidence" and that "[t]he answers and not the questions are determinative on the issue of whether the State's evidence is undermined").

We find Moreno's reliance on these cases to be misplaced. As an initial matter, we note that none of the cases highlighted by Moreno dealt with the failure to admonish a defendant about potential deportation consequences for pleading guilty to an offense or set out the types of information that may be considered in determining whether the failure to admonish was harmless error. Moreover, although Moreno characterizes his attorney's comment as a question, the comment was actually made during a series of statements that his attorney made before asking the witness a question. Specifically, Moreno's attorney made the following statements before asking a question:

> Okay, thank you, sir. I think 17 is something you alluded to earlier [], you want probationers who can work to work, and you are able to check that they are working through the W-2 forms and tax stubs. And we have [a] client here who is an American citizen, so that doesn't apply.

In addition, as set out above, the court of criminal appeals has specifically directed appellate courts to consider statements made by attorneys when determining whether the record supports an inference regarding a defendant's citizenship. *See Fakeye v. State*, 227 S.W.3d 714, 716 (Tex. Crim. App. 2007).

Although not referred to by Moreno in his brief, we note that one of our sister courts of appeals determined that a statement by a defendant's attorney that the defendant's parents "married young in Mexico" was not evidence that the defendant "was not a United States citizen" because "it

words "Moreno was born in California," her statement does support a reasonable inference that Moreno was born in California. *See Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008) (explaining that when courts ascertain plain meaning, they "read words and phrases in context and construe them according to the rules of grammar and usage").

In light of the testimony from Moreno's aunt and of the statement by his attorney, we believe that the record provides enough facts upon which inferences may reasonably be made that Moreno was born in the United States, is a citizen of the United States, and is, therefore, not subject to deportation. *See Reyes*, 2017 WL 1130373, at *10 (finding that error in failing to "give the deportation and immigration admonishment" was harmless where entry in "TXGANG database" admitted into evidence stated that defendant was born in "'OR,' which is a common abbreviation for the state of Oregon," and "reflect[ed] appellant's citizenship as 'U.S.'"); *Easley v. State*, No. 01-14-00296-CR, 2015 WL 1263140, at *2-3 (Tex. App.—Houston [1st Dist.] Mar. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (holding that admonishment error was harmless where defendant "testified during the punishment phase of trial that he was born in Houston, Texas"); *Hines*, 396 S.W.3d at 709 (determining that admonishment error was harmless because it was "reasonable to conclude that [defendant] was in fact a citizen and not subject to deportation

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is axiomatic that argument of counsel is not evidence," but the court also explained that the statement was not evidence that the defendant was not a citizen because "there are many United States citizens residing in this country whose parents married in Mexico and/or are Mexican nationals." *See Mata v. State*, 1 S.W.3d 226, 228 (Tex. App.—Corpus Christi 1999, no pet.). In contrast, in the case before this Court, the statement by Moreno's attorney was a clear affirmation that Moreno was a United States citizen. Moreover, *Mata* was issued before the directive by the court of criminal appeals in *Fakeye*. In any event, to the extent that the analysis from *Mata* is inconsistent with our determination in this case, we are not bound by the analysis from our sister court.

at the time he pleaded guilty" based on statement made by defendant that was recorded during police interview in which he related that he was born in Mississippi); *Lawrence v. State*, 306 S.W.3d 378, 379 (Tex. App.—Amarillo 2010, no pet.) (holding that admonishment error was harmless where "pen packet admitted into evidence" stated that defendant "was born in Texas"); *Sotero v. State*, No. 05-06-00504-CR, 2007 WL 155113, at *1 (Tex. App.—Dallas Jan. 23, 2007, no pet.) (mem. op., not designated for publication) (concluding that admonishment error was harmless because "the record affirmatively show[ed] appellant [wa]s a United States citizen" where prior judgment admitted into evidence included arraignment sheet with "a check-marked box" showing that appellant stated that he was citizen). Accordingly, we must conclude that the district court's error in failing to admonish Moreno regarding potential deportation consequences was harmless and, therefore, overrule Moreno's issue on appeal.

CONCLUSION

Having overruled Moreno's sole issue on appeal, we affirm the district court's judgment of conviction.

David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: August 8, 2017

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