NUMBER 13-15-00505-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JOSHUA SANTANA TIMMONS, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 23rd District Court of Wharton County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Hinojosa

Joshua Timmons appeals from a judgment sentencing him to thirty-three years' confinement for a conviction of evading arrest while using a vehicle, *see* TEX. PENAL CODE ANN. § 38.04(a) (setting out elements of offense), (b)(2)(A) (specifying that offense is a third-degree felony if actor uses vehicle) (West, Westlaw through 2015 R.S.), and a finding that he used or exhibited a motor vehicle as a deadly weapon. *See id*. §

1.07(a)(17) (defining "deadly weapon") (West, Westlaw through 2015 R.S.). In four issues, appellant contends that: (1) the evidence is legally insufficient to support the deadly weapon finding on the ground that "there was no evidence anyone was ever actually in danger;" (2) trial counsel was ineffective for failing to request a necessity instruction in the jury charge; (3) there is a violation of the United States Constitution's bar against double jeopardy relating to the use of a vehicle; and (4) there was "fundamental structural error" on the ground that both parties argued for the jury to consider the parole law in crafting its sentence. We affirm.

I. BACKGROUND[1]

On February 11, 2015, Vinson Valdez, a sergeant with the Wharton Police Department, was training Herman Hayes, a new police officer. As part of the training, Hayes drove Valdez in a marked police SUV as the two patrolled around Wharton. At approximately noon, Valdez and Hayes began looking for appellant on account of outstanding warrants. Around 5:40 p.m., as Valdez and Hayes were ending their shift, they located appellant travelling westbound on FM 102 in Wharton.

Valdez planned for Hayes to initiate a traffic stop near a Wal-Mart and wait for other officers to serve the warrant. As Hayes activated the SUV's sirens and lights, appellant's automobile, according to Valdez and Hayes, accelerated and emitted dust or smoke from the muffler. The State introduced a dash-cam video showing appellant's car speeding away from the police SUV. At one point toward the beginning of the

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

approximately twelve-minute chase, appellant's vehicle crossed onto the oncoming lane of travel, swerved back and passed in between two cars on appellant's lane of travel, and then passed two cars on the shoulder. Later in the chase, the video shows appellant crossing into the oncoming lane as appellant's vehicle passed a farm tractor that straddled appellant's lane of travel and its shoulder. At the time appellant passed the tractor, an oncoming vehicle swerved onto the shoulder of its lane of travel to avoid colliding with appellant's vehicle. According to Valdez, the vehicles were travelling "approximately a hundred and thirty miles per hour." However, on the dash-cam video, the officers, in their conversation with each other, state the speed was 110 miles per hour.

The vehicle chase ended in the neighboring county when appellant's vehicle turned left where FM 102 came to a "y," and appellant's vehicle spun onto a grassy ditch. The dash-cam video shows appellant exit his vehicle and run towards the brush along the roadway. Appellant was apprehended by law enforcement personnel from the neighboring county. According to Valdez, two "baggies of marijuana" were found on appellant when he was searched. At trial, appellant contended that he led police on the chase because he feared Hayes would injure or kill him. Appellant posited that Hayes believed appellant was involved in a shooting of Hayes's nephew. Hayes testified that appellant was not a culprit in his nephew's shooting.

The jury found appellant guilty of evading arrest while using a vehicle. It also found that appellant used his vehicle as a deadly weapon. Appellant pleaded true to two previous felony convictions, making the range of confinement life or a term not greater than ninety-nine years or not less than twenty-five years. *See* TEX. PENAL CODE ANN. §

12.42 (West, Westlaw through 2015 R.S.). During the punishment phase's closing arguments, appellant requested from the jury a term of confinement of twenty-five years. The State sought a term of thirty years. The jury returned a verdict of thirty-three years' confinement. The trial court sentenced appellant in accordance with the jury's verdict. No motion for new trial was filed. This appeal ensued.

II. DISCUSSION

A. Deadly Weapon

In his first issue, appellant contends that the evidence is legally insufficient to support the deadly weapon finding on the ground that "there was no evidence anyone was ever actually in danger." Appellant argues that "[a]t no point did the officers say that [appellant] either drove at them, another officer, or a civilian or placed any particular person in danger." Appellant further argues that "[n]o one else was identified as at risk, and no other individual was brought forth to state they had to avoid [appellant] or were nearly hit."

1. Standard of Review

Under a legal-sufficiency standard of review, we view the evidence in the light most favorable to the verdict and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When performing this review, we bear in mind that it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make reasonable inferences "from basic facts to ultimate facts." *Id.* Moreover, 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." *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). Furthermore, we presume that conflicting inferences were resolved in favor of the conviction and defer to that resolution. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

2. Applicable Law

The Texas Penal Code defines "'[d]eadly weapon,'" in relevant part, as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17). "In order to sustain a deadly-weapon finding, the evidence must demonstrate that: (1) the object meets the definition of a deadly weapon; (2) the deadly weapon was used or exhibited during the transaction on which the felony conviction was based; and (3) other people were put in actual danger." *Brister v. State*, 449 S.W.3d 490, 494 (Tex. Crim. App. 2014). "'Others' connotes individuals other than the actor himself, and danger to the actor alone does not meet the requisite standard of deadly-weapon use." *Id*. Additionally, "[o]bjects that are not usually considered dangerous weapons may become so, depending on the manner in which they are used during the commission of an offense," and a "motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury." *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The court of criminal appeals has explained:

> . . . the statute itself does not require pursuing police officers or other motorists to be in a zone of danger, take evasive action, or require appellant to intentionally strike another vehicle to justify a deadly weapon finding. The volume of traffic on the road is relevant only if no traffic exists. The plain language of the statute indicates that a deadly weapon finding will be sustained if the definition of a deadly weapon is met. Capability is

> evaluated based on the circumstances that existed at the time of the offense. *The statute specifically pertains to motor vehicles, so a deadly weapon finding is appropriate on a sufficient showing of actual danger, such as evidence that another motorist was on the highway at the same time and place as the defendant when the defendant drove in a dangerous manner.* We do not suggest that a defendant should be charged with using a vehicle as a deadly weapon every time the offense of evading arrest or detention is committed. The determination to seek a deadly weapon finding in those circumstances is a fact-specific inquiry, and the facts will not always support such a finding.

Id. at 799 (internal citations omitted) (emphasis added).

The court of criminal appeals provided this explanation on when a vehicle may be a deadly weapon before determining that the court of appeals did not properly employ a factual sufficiency review. *Id*. The court of criminal appeals stated that the lower court misconstrued the actual danger requirement by equating a deadly weapon's *capability* of causing death or serious bodily injury with its *probability* of doing, thus reading into the statute an additional requirement of evasive action or zone of danger. *Id*. (emphasis in original). "Specific intent to use a motor vehicle as a deadly weapon is not required." *Id*. Further, when evaluating "the manner in which the defendant used the motor vehicle" and when determining whether a "defendant's driving was reckless or dangerous," we can consider, among other things, "(1) intoxication; (2) speeding; (3) disregarding traffic signs and signals; (4) driving erratically; and (5) failure to control the vehicle." *Foley v. State*, 327 S.W.3d 907, 916 (Tex. App.—Corpus Christi 2010, pet. ref'd) (mem. op.).

3. Analysis

According to Officer Hayes, the chase began at approximately 5:40 p.m. on February 11, 2015. Officer Hayes and Sergeant Valdez testified that as soon as Officer Hayes activated the police SUV's sirens and overhead lights, a cloud of smoke or dust

emanated from the tailpipe of appellant's vehicle as he accelerated away from them down FM 102.

A dash-cam video from the police SUV Officer Hayes drove was admitted into evidence and viewed by the jury. The growl of an engine is audible as appellant's vehicle sped away down a two-lane road. However, it is unclear whether the sound is coming from appellant's vehicle or the police SUV. Near the beginning of the chase, appellant's vehicle crossed the yellow dividing line, two oncoming vehicles pulled to their shoulder, appellant's vehicle swung back to its original lane of travel and passed in between two vehicles that had been traveling in appellant's direction but had slowed down. Appellant's vehicle then drove on the shoulder and passed two additional vehicles that had been traveling in front of appellant. Later in the chase, appellant crossed into an oncoming lane as his vehicle passed a farm tractor that straddled appellant's lane of travel and its shoulder. At the time appellant passed the tractor, an oncoming vehicle swerved onto the shoulder to avoid colliding with appellant's vehicle. Throughout the chase, several vehicles are seen in the oncoming lane of travel. Sergeant Valdez estimated that the speed of the chase was at "over a hundred and twenty, approximately a hundred thirty miles per hour." However, on the dash-cam video, the officers, in their conversation with each other, state the speed was 110 miles per hour. As the chase ends, appellant's vehicle turns to the left and it skids into a ditch. Appellant exits his vehicle and runs towards some bushes. According to Sergeant Valdez's testimony, constables apprehended appellant.

Appellant fails to explain how the dash-cam video fits into his legal sufficiency

challenge. We conclude that the dash-cam video dooms appellant's legal sufficiency challenge. Viewing the evidence in the light most favorable to the verdict, *see Jackson*, 443 U.S. at 319, we conclude that there was legally-sufficient evidence supporting the jury's determination that the manner in which appellant drove his vehicle when he attempted to evade arrest was capable of causing death or serious bodily injury and that other drivers were put in actual danger. *Compare Drichas*, 175 S.W.3d at 797–98 (determining that there was sufficient evidence to support deadly-weapon finding where defendant drove wrong way on highway during high-speed chase, failed to yield to oncoming traffic, committed numerous traffic offenses, lost control of his car, drove erratically, "wove between lanes and within lanes," and abandoned his vehicle while it was still moving "allowing the truck to roll into a parked van, which then hit a mobile home"), *with Brister*, 449 S.W.3d at 495 (concluding that there was insufficient evidence where evidence showed that "on a single occasion" defendant "briefly crossed the center line into the oncoming lane of traffic at a time in which there were very few, if any, cars in that lane" and where evidence showed that defendant committed no other traffic offenses and promptly pulled over after police activated emergency lights).

Appellant's first issue is overruled.

B. Ineffective Assistance of Counsel

In his second issue, appellant argues that his trial counsel was ineffective on the ground that he failed to request an instruction regarding necessity.

1. Standard of Review

To prove ineffective assistance of counsel, appellant must demonstrate that: (1)

his counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and we will sustain allegations of ineffectiveness only if they are firmly founded in the record. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We also indulge a strong presumption that counsel's actions were motivated by sound trial strategy, and we will not conclude the action was deficient unless it was so outrageous that no competent attorney would have engaged in such conduct. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). We look to the totality of the representation and not to isolated instances of error or to only a portion of the proceedings. In the absence of evidence regarding counsel's reasons for the challenged conduct, the record on direct appeal is simply undeveloped and cannot adequately reflect the alleged failings of trial counsel. *Freeman v. State*, 125 S.W.3d 505, 506–507 (Tex. Crim. App. 2003).

2. Applicable Law

Necessity is a confession-and-avoidance defense that excuses an actor's conduct. *See Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010). To be entitled to the defense, the defendant must first admit to the conduct of the charged offense. *Id*. The jury may then excuse that conduct if it determines that: (1) the defendant reasonably believed that his conduct was immediately necessary to avoid imminent harm; (2) the

desirability and urgency of avoiding the harm clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification does not otherwise plainly appear. *See* TEX. PENAL CODE ANN. § 9.22 (West, Westlaw through 2015 R.S.).

3. Analysis

Appellant argues that he "expressed fear of surrendering to Officer Hayes due to [his] involvement in [Officer Hayes's] nephew's shooting." Appellant further argues that the defense of necessity was not requested, "even though [appellant's trial] lawyer spent his entire defense on the effort." Appellant's argument is lacking in evidence and authority.

Even if appellant's trial counsel had requested a necessity instruction and assuming such a defense may be raised against an evading arrest charge,[2] the trial court

[2] We have found two cases that suggest a necessity defense may not be used against an evading arrest charge. In *Maldonado v. State*, 902 S.W.2d 708, 712 (Tex. App.—El Paso, 1995, no pet.) a defendant was convicted of taking a firearm from a peace officer and attempted capital murder. After fleeing on foot from police officers, the defendant engaged in a physical struggle with several police officers, pulled firearms from two police officers, and pulled the trigger on a firearm several times while it was pointed at an officer's stomach and chest. *Id*. at 710. However, the firearm's safety was engaged. *Id*. On appeal, the defendant argued that the trial court erred by refusing to submit the defense of necessity to the jury. *Id*. at 711. In addition to finding no evidence of the imminent harm element, the Eighth Court of Appeals also found such a defense inapposite to Texas law. It wrote:

> In the further alternative, taking the elements in the order the statute lists them, the threshold issue is whether Appellant reasonably believed his conduct was necessary to avoid imminent harm. He did not testify to this effect, and the testimony of other witnesses supports no similar inference. To the contrary, the evidence was undisputed that Appellant ran when he first spotted police and thereafter ignored police instructions and avoided detention by running, jumping a fence, and knocking an officer to the ground while fleeing. *One who unlawfully avoids police detention simply cannot claim that his criminal conduct is a necessary response to the legitimate police action that his illicit flight spawns.* The evidentiary shortcoming we here identify, as well as the twofold inadequacy of his brief, is a product of Appellant's inability to support his apparent but, we emphasize, unstated theory that someone fleeing detention can invoke the defense of necessity to justify his attempt to disarm and shoot a peace officer. We decline to hold that every defendant who physically resists detention or arrest is entitled to an instruction on the issue of necessity simply because he resists.

may have refused the request on the ground that he presented no evidence of the imminent harm element. *Humaran v. State*, 478 S.W.3d 887, 903 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). For an "imminent harm" to occur, there must be an emergency situation that requires a split-second decision without time to consider the law. *Id.* (citing *Schier v. State*, 60 S.W.3d 340, 343 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd)). While appellant may have testified that he believed himself to be in imminent harm, there is no evidence of imminent harm beyond appellant's subjective belief. There is no evidence that appellant was confronted with the type of harm defined in *Humaran* at the time he accelerated away from the police vehicle operated by Officer Hayes. Thus, we cannot say that appellant's trial counsel's failure to request a jury instruction on necessity fell below an objective standard of reasonableness.

Appellant's second issue is overruled.

C. Double Jeopardy

In appellant's third issue, he argues that there is a violation of the Double Jeopardy

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Id. at 712 (emphasis added).

In *Ford v. State*, 112 S.W.3d 788, 790 (Tex. App.—Houston [14th Dist.] 2003, no pet.), the defendant fled from a police officer in a motor vehicle, abandoned the vehicle after it collided with a police vehicle, and was captured after a foot chase. In rejecting appellant's argument, the Fourteenth Court of Appeals wrote:

> Furthermore, one who unlawfully avoids police detention simply cannot claim that his criminal conduct is a necessary response to the legitimate police action that his illicit flight spawns. *Maldonado*, 902 S.W.2d at 712. We hold that one who provokes the difficulty, or is responsible for having placed himself in the position from which he attempts to extricate himself by committing a criminal offense, is not entitled to a charge authorizing his acquittal of that offense based upon necessity. *Leach v. State*, 726 S.W.2d 598, 600 (Tex. App.—Houston [14th Dist.] 1987, no pet.).

Ford, 112 S.W.3d at 794.

Clause contained in the Fifth Amendment to the United States Constitution. Specifically, appellant argues that "the State got a double benefit here – first it got the enhancement under the penal code by alleging the use of the motor vehicle in the commission of the offense, then it received a further increase in incarceration time by seeking and obtaining the deadly weapon for the same vehicle."

None of the three cases appellant cites are on point: (1) *Langs v. State*, 183 S.W.3d 680 (Tex. Crim. App. 2006); (2) *Ex parte Knipp*, 236 S.W.3d 214 (Tex. Crim. App. 2007); and (3) *Ervin v. State*, 991 S.W.2d 804 (Tex. Crim. App. 1999). On the other hand, we have found at least three opinions rejecting appellant's argument.

The Second Court of Appeals has rejected similar arguments on two occasions. In *Martinez v. State*, 883 S.W.2d 771, 772 (Tex. App.—Fort Worth 1994, no pet.), Martinez was convicted of involuntary manslaughter as a result of driving while intoxicated. The jury found that the vehicle Martinez was driving was a deadly weapon. *Id*. On appeal, Martinez argued that the deadly weapon finding violated his right to be free of double jeopardy because the action supporting the deadly weapon finding (driving a vehicle while intoxicated) was also an essential element of the charged offense. *Id*. The *Martinez* court rejected Martinez's argument.

In *Harris v. State*, No. 02-09-00177-CR, 2011 WL 754396 at *1 (Tex. App.—Fort Worth Mar. 3, 2011, no pet.) (mem. op., not designated for publication), a friend, suspecting Harris had overdosed on Xanax while drinking beer, drove an unconscious Harris to an emergency department entrance. While still in the car, Harris woke up, commandeered his friend's vehicle, and nearly struck a police officer and his patrol

vehicle as he accelerated out of the hospital parking lot. *Id*. Harris led the police on a chase that reached speeds over a 100 miles an hour. *Id*. A jury found Harris guilty of evading arrest and also found that he had used the vehicle as a deadly weapon. *Id*. at *2. On appeal, Harris argued, among other things, that the jury's deadly weapon finding punished him twice for the same conduct. *Id*. at *5. Relying on *Martinez*, 883 S.W.2d at 772, the Second Court of Appeals rejected Harris's argument. *Harris*, 2011 WL 754396 at *6. The court wrote:

> Section 12.35 of the penal code makes no exception for enhancement of felonies when the instrumentality alleged to be a deadly weapon is also an essential element of the offense. Moreover, a person could evade arrest with a vehicle without using the vehicle as a deadly weapon. The enhancement, therefore, comes from using a vehicle in a manner that subjects others to the risk of death or serious bodily injury, not by merely using a vehicle. Thus, here, Appellant was found guilty of a state-jail felony, which his use of a deadly weapon enhanced to a third-degree felony: one offense, one punishment.

Id. at *6 (internal citations omitted).

In *Murphy v. State*, No. 01-08-00768-CR, 2010 WL 1620803 (Tex. App.—Houston [1st Dist.] Sep. 22, 2010, pet. ref'd) (mem. op., not designated for publication), the court explained:

> [Murphy] was convicted of evading arrest, which requires proof that [he], while using a vehicle, intentionally fled from a person he knew to be a peace officer attempting lawfully to arrest or detain him. It was unnecessary for the jury to make a deadly weapon finding to convict him of evading arrest. A deadly-weapon finding may be made if a defendant used or exhibited a deadly weapon. When the trial court makes a deadly weapon finding in its judgment under article 42.12, section 3g(a)(2) of the Texas Code of Criminal Procedure, this finding is not a separate conviction or punishment. While a deadly-weapon finding does affect a defendant's eligibility for probation and parole, it does not alter the range of punishment to which the defendant is subject, or the number of years assessed. A deadly-weapon finding may affect how the sentence is served, but it is not part of the sentence.

> *Because the deadly weapon finding does not affect the assessment of punishment, the trial court's deadly weapon findings did not punish appellant a second time.*

Id. at *13 (internal citations omitted) (emphasis added).

Assuming that we may consider the double jeopardy issue,[3] appellant has not presented a good reason for us to split from the holding reached by the Second Court of Appeals in *Martinez*. Moreover, while *Harris* and *Murphy* have no precedential value, *see* TEX. R. APP. P. 47.7, we find them persuasive as to appellant's double jeopardy issue. Appellant was convicted under section 38.04(b)(2)(A) of the Texas Penal Code, which is a third-degree felony. He was punished under section 12.42(d) because of prior convictions he acknowledged. *See* TEX. PENAL CODE ANN. §12.42(d) (West, Westlaw through 2015 R.S.); *see also Burton v. State*, 136 S.W.3d 355, 364-65 (Tex. App—Austin 2004, pet. ref'd) (rejecting an unpreserved double jeopardy challenge in an appeal from a conviction for evading arrest with a vehicle where punishment was enhanced by two prior felony convictions).

Appellant's third issue is overruled.

D. Parole

In appellant's fourth issue, he argues that "there was fundamental structural error here" on the ground that "BOTH sides argued for the jury to consider the parole law in crafting their sentence." (Emphasis in original). The State responds that appellant

[3] Appellant acknowledges that he did not preserve the double jeopardy issue that he raises before us. Normally, an appellant may raise a double jeopardy issue on appeal for the first time only if the undisputed facts show that the violation is clearly apparent on the face of the record and no legitimate state interest was served by enforcement of the usual rules of procedural default. *Gonzalez v. State*, 8 S.W.3d 640, 642 (Tex. Crim. App. 2000).

failed to preserve error.

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The court of criminal appeals has held that structural errors are "federal constitutional errors labeled by the United States Supreme Court as such." *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005). The Supreme Court has found structural error only in a "very limited class of cases": the total deprivation of counsel at trial, lack of an impartial trial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the "beyond a reasonable doubt" standard. *Johnson v. United States*, 520 U.S. 461, 468–69 (1997). The complaint that appellant lodges does not fit within the classes of cases recognized by the U.S. Supreme Court in *Johnson*. Accordingly, the alleged error was not structural and, as such, it must have been preserved to be considered.

To preserve a complaint about improper jury argument for appellate review, the defendant should (1) make a timely and specific objection, (2) request an instruction to disregard if the objection is sustained, and (3) move for a mistrial if the instruction to disregard is granted. TEX. R. APP. P. 33.1(a); *see also Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *Cooks v. State*, 844 S.W.2d 697, 727–28 (Tex. Crim. App. 1992). A defendant forfeits his right to complain on appeal about an improper jury argument if he fails to object to the argument or fails to pursue his objection to an adverse

ruling. *Threadgill v. State*, 146 S.W.3d 654, 670 (Tex. Crim. App. 2004). The "essential requirement" to ensure preservation is "a timely, specific request that is refused by the trial court." *Cruz*, 225 S.W.3d at 548; *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Moreover, the complaint argued on appeal must comport with the objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986).

In this case, not only did appellant fail to object to the State's statements regarding the effect of parole, appellant made those statements first. The State merely responded to appellant's closing argument. On this record, we hold that appellant failed to preserve his fourth issue in the trial court.

Appellant's fourth issue is overruled.

III. CONCLUSION

The trial court's judgment is affirmed.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
27th day of April, 2017.