NUMBER 13-16-00417-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

GAMALIEL DANIEL WALKER, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Goliad County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras

Appellant Gamaliel Daniel Walker was convicted of assault-family violence, a third degree felony, *see* TEX. PENAL CODE ANN. § 22.01(b)(2)(B) (West, Westlaw through 2015 R.S.), and he was sentenced to three years' imprisonment. On appeal, Walker contends by four issues that: (1) the trial court erred by allowing the State to define "reasonable doubt" during voir dire; (2) the trial court erred by allowing a witness to testify regarding

the complainant's medical condition; (3) the trial court erred by admitting evidence of a prior conviction at the punishment phase; and (4) the State withheld exculpatory evidence. We affirm.

I. BACKGROUND

An indictment returned by a Goliad County grand jury alleged that Walker, on or about September 15, 2013, intentionally and knowingly and recklessly caused bodily injury to Mary Jane Tovar, Walker's live-in girlfriend, by impeding her normal breathing and circulation by applying pressure to her throat and neck and blocking her nose and mouth. *See id*.

Tovar testified at trial that she and Walker, her fiancé, were drinking on the night of Saturday, September 14, 2013, when they got into a verbal argument. According to Tovar, when she refused Walker's sexual advances, Walker got angry and accused her of infidelity. She stated Walker, a former boxer, slapped her on the face with the back of his hand and pulled her up by her hair. At that point, Tovar asked Walker to leave their trailer and he did so. Tovar testified she went out looking for Walker because she thought he was too intoxicated to drive. Walker then came back to the trailer, where he hit Tovar with a laundry basket and "slammed" her head against a washing machine. Tovar testified that, while Walker was holding onto her by her hair, she took off her engagement ring, "stuck" the ring in his mouth, and told him that she was leaving. Walker continued to punch and slap Tovar. According to Tovar, at one point, Walker grabbed her by the throat and choked her, causing her to lose consciousness briefly. When Tovar regained consciousness, she started kicking Walker in his back. Eventually, she was able to escape.

The next day, Tovar went to the hospital and learned she had suffered a ruptured eardrum and fractured rib. She went to the Goliad County Sheriff's Department and gave a written statement.

Walker testified in his own defense. He stated that he was a former combat medic in the Army and also a former boxing champion and mixed martial arts fighter. In 2005, he broke his back in a refinery accident and was "paralyzed for over six months." He stated that, on the night in question, Tovar accused him of sleeping with her sister and she punched him in the face. He stated Tovar elbowed and kicked him in the back. He went outside to smoke a cigarette, and when he came back, they started talking and she pushed him and bit him in the chest. Walker testified that, to defend himself, he "cross faced" Tovar, which he explained as "when you put your forearm and your hand to—above somebody's chin area and move upwards." He then lifted her up by the armpits and "threw her off," causing her to fall on the floor and lose consciousness for three or four seconds. Walker denied ever choking Tovar.

The jury found Walker guilty as charged. Walker's court-appointed appellate counsel failed to file a timely notice of appeal, but the Texas Court of Criminal Appeals later granted Walker's application for writ of habeas corpus seeking an out-of-time appeal. *Ex parte Walker*, No. WR-84,975-01, 2016 WL 3346516, at *1 (Tex. Crim. App. June 8, 2016) (not designated for publication); *see* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West, Westlaw through 2015 R.S.). The trial court appointed new appellate counsel, who then filed the instant appeal.

II. DISCUSSION

A. Definition of Reasonable Doubt

By his first issue, Walker contends that the trial court erred by "allowing" the prosecutor to define "reasonable doubt" to the venire panel during voir dire, as follows:

> [Prosecutor:] Now, I keep using the term "beyond a reasonable doubt," and this is left undefined. It's common, common knowledge or what the general gist of it is. A judge I knew used to define it as: That degree of certainly you would bring to any important decision in your life and an example is when to cross a busy road.
>
> [Defense counsel]: I'm going to object to the definition of beyond a reasonable doubt.
>
> [Prosecutor]: I didn't say it's a legal definition. I'm just giving an example of what—
>
> [Defense counsel]: I'm pretty sure, Judge, the case law specifically forbids the prosecutor from defining reasonable doubt in this case. It's reversible error.
>
> [Prosecutor]: Well I'm pretty sure it's not illegal.
>
> THE COURT: Let me just instruct the jury panel that at one time there was a legal definition but at this time there is not but attorneys can give examples and, you know, hypotheticals that might give you some idea of what reasonable doubt may be to you so go ahead.
>
> [Prosecutor]: That's what I meant to do show an example like this Judge had said: It would be any degree of certainty that you bring to any important decision like when to buy a house, when to cross a busy street, those are important decisions.
>
> A reasonable doubt means a doubt that you can give a reason not just a funny feeling, okay? And it's based on common sense. And what beyond a reasonable doubt does not mean—reasonable doubt is not created simply because there's conflicting testimony or that there is—you have a funny feeling, things like that. It's—it's sometimes you'll hear somebody say, "Well, it could happen this other way." Well what evidence is

> there to support that? Well there's not. I just kind of think that. I mean that's—that's just another way of proving beyond all doubt. Now some people believe that before they could convict a person of a felony they could not do this and feel ethically all right if the—unless the State has proven [its] case beyond all doubt, okay? In other words it would hold the State to a higher standard than what the law requires and that's okay if that's how you feel, but we need to know that now.

The Texas Court of Criminal Appeals has held that the "better practice" is for the trial court not to give a definition of reasonable doubt to the jury. *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000). Nevertheless, it is permissible for the State to inquire into the jury's understanding of the parameters of that burden of proof. *Fuller v. State*, 363 S.W.3d 583, 586 (Tex. Crim. App. 2012); *Wilder v. State*, 111 S.W.3d 249, 252–53 (Tex. App.—Texarkana 2003, pet. ref'd) (holding that prosecutor's explanation that State did not have to prove one hundred percent certainty was permissible). This area of inquiry is designed not to assign a precise meaning to the term "beyond a reasonable doubt," which is left to the jurors themselves to apply in their own common sense understanding, but instead is to test whether the prospective jury members will hold the State to an impermissibly high or low burden of proof. *Fuller*, 363 S.W.3d at 587. Here, the prosecutor made a permissible inquiry into the venire members' understanding of the proper parameters of the beyond a reasonable doubt burden of proof. The State was not urging the venire members that they could convict upon less than the appropriate standard or if not all of the elements were proven. We conclude that the trial court did not err in overruling defense counsel's objection to this remark.

We note also that counsel did not object when the prosecutor repeated and elaborated on his remark. *See Fuentes v. State*, 991 S.W.2d 267, 273 (Tex. Crim. App. 1999) (holding defendant waived complaint about trial court's explanation of reasonable

doubt standard during voir dire by failing to renew objection when trial court repeated explanation). Accordingly, Walker cannot show he was harmed by the ruling. *See* TEX. R. APP. P. 44.2. Walker's first issue is overruled.

B. Testimony by Lay Witness

By his second issue, Walker contends that the trial court erred by allowing a non-expert witness, Georg Ann Fenner, a jailer for the Goliad County Sheriff's Department, to testify that Tovar appeared to have "petechia" in her eyes.[1] We review a trial court's rulings on admissibility of evidence for abuse of discretion. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). We will not disturb the trial court's ruling if it was within the "zone of reasonable disagreement." *Id*.

Fenner testified that she was asked to take photographs of Tovar's injuries. When she was asked how Tovar appeared at the time the photographs were taken, the following colloquy occurred:

> A. [Fenner] She had been crying, and she was walking very slow as if she had pain in her upper body (indicating). She had some petechia in her eyes that looked like the blood vessels were broken not a whole lot, but it was there you could see the petechia in her eyes.
>
> Q. [Prosecutor] And when you saw "petechia," can you describe to the jury a little bit more about what you mean.
>
> A. Petechia happens when someone is significantly choked. It bursts the blood vessels in their eyes.
>
> [Defense counsel]: Judge, I'm going to object to qualifications. This is a jailer. They haven't established that she's qualified to make this statement.

[1] "Petechia," singular for petechiae, is "a minute reddish or purplish spot containing blood that appears in skin or mucous membrane as a result of localized hemorrhage." MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/petechia (last visited June 20, 2017).

THE COURT: Sustained.

Q. [Prosecutor] How are you familiar with your knowledge of petechia?

A. My grandson is in the Army National Guard and during his training he has to carry a heavy backpack with ammunition in it and when it slips up around his neck, it chokes him so he has to jump and pull it back up. He sustained a significant amount of petechial breakage in his eyes and wound up in the emergency room, and it's where the blood vessels busts [sic] from choking.

Q. So that's something you know from a rationally based perception?

A. Yes, sir.

Q. And have you seen your grandson's eyes in that condition?

A. Yes.

Q. Did they seem similar?

[Defense counsel]: Your Honor, I don't think that—she's making a medical diagnosis here. If they wanted to put on this evidence, they should have put on the medical records, and they didn't.

THE COURT: Overruled.

Q. [Prosecutor] Did you—and so the eyes of Ms. Tov[a]r and the eyes of your grandson looked the same?

A. Exactly the same, yes, sir.

Q. And were you able to form a belief as to whether or not Ms. Tovar was choked?

A. I believe she definitely was choked.

Q. Do you have a—

A. She had bruising on her neck and her thr[o]at area.

On appeal, Walker argues that this testimony was improper because Fenner "does not qualify as an expert by knowledge, skill, experience, training, or education to offer an

opinion that [Tovar] had petechia." *See* TEX. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."). In response, the State contends that Fenner's testimony was not expert testimony but was rather proper lay opinion testimony. *See* TEX. R. EVID. 701.

We agree with the State. Texas Rule of Evidence 701 provides that, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." *Id*. Fenner testified that she was familiar with petechiae because her grandson suffered from the condition when he was "choking" due to the weight of a heavy backpack on his neck. She stated that Tovar's eyes looked "[e]xactly the same" as her grandson's eyes. The trial court did not abuse its discretion in overruling defense counsel's objection to this testimony because it was rationally based on Fenner's perception and was helpful in determining a fact in issue. *See id.*

We note additionally that defense counsel did not object to Fenner's subsequent statement that she believed Tovar was choked because of the petechiae as well as bruising on her neck and throat. Therefore, even if the trial court erred in denying Walker's objection, he cannot show the error was harmful. *See* TEX. R. APP. P. 44.2; *Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (noting that any preserved error with respect to admission of complained-of evidence is harmless when "very similar" evidence is admitted later without objection).

Walker's second issue is overruled.

C. Evidence of Prior Conviction

By his third issue, Walker contends that the trial court erred by admitting documentary evidence of a prior conviction at the punishment phase "with insufficient authentication that the conviction was in fact appellant's."

The State sought to admit the following exhibits at the punishment phase: (1) State's Exhibit 14, showing that in 2008, Walker pleaded guilty to and was convicted of driving with a suspended license, a Class B misdemeanor, and was sentenced to ten days in the county jail; (2) State's Exhibit 15, showing that in 2007, Walker pleaded guilty to and was convicted of misdemeanor driving while intoxicated and was sentenced to 180 days in jail, probated for one year; and (3) State's Exhibit 16, showing that in 2000, Walker pleaded nolo contendere to and was convicted of reckless driving, and was sentenced to thirty days in the county jail. Defense counsel objected to State's Exhibit 16 on grounds that "[i]t has not been authenticated to identify the same person as my client and therefore cannot be used as evidence by this Court under Rule 9[0]1." In response, the prosecutor asked that the court compare the defendant's signature on State's Exhibit 16 with Walker's signature on his driver's license record, which was entered into evidence. The trial court overruled the objection and admitted State's Exhibit 16.

Subsequently, Walker's father testified that Walker has a twin brother, Gilbert G. Walker, as well as a younger brother, Mark Anthony Walker, who is now deceased. Walker's father stated that Mark was born on November 30, 1973, and was frequently in trouble with the law. He stated that Mark had used his brothers' names as an alias "many times." He recalled that, one time, Mark told him that he used Walker's name as an alias

for "a juvenile thing."

On appeal, Walker notes that "[he] and his younger brother had similar birth dates which were sometimes confused in court documents and other penal records," and he contends that "sufficient doubt exists as to whether the conviction in [State's Exhibit 16] is actually appellant's or that of his deceased brother."

We disagree. When prior convictions are alleged in an indictment to enhance the level of an offense, the State must prove beyond a reasonable doubt that (1) the prior convictions exist, and (2) the defendant was the defendant in those prior convictions. *See Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). Here, the misdemeanor convictions were not used to enhance the level of the offense. Walker does not cite any rule or case law establishing that, in order for prior convictions to even be admissible, the State must prove their authenticity beyond a reasonable doubt. On the contrary, the judgment in State's Exhibit 16 was self-authenticating because it was certified by the district clerk, *see* TEX. R. EVID. 902(8), and the name and birthdate appearing on the judgment were identical to Walker's name and birthdate as shown in his driver's license.[2] The trial court therefore did not abuse its discretion in admitting this evidence. Moreover, Walker has not shown that he was harmed by the ruling. *See* TEX. R. APP. P. 44.2. Walker's third issue is overruled.

D. *Brady* Violation

By his fourth issue, Walker contends that the State violated his due process rights by withholding exculpatory evidence—specifically, Tovar's medical records which, he

[2] There is nothing in the record indicating that Walker's birthdate, October 29, 1972, was "confused in court documents and other penal records" with his deceased brother's birthdate, as he alleges on appeal.

claims, shows that Tovar "received some or even all of her physical injuries from a physical fight she had with her adult sister a day before the offense date in this cause."

As the United States Supreme Court held in *Brady v. Maryland*, the Due Process Clause of the Fourteenth Amendment is violated when: (1) the State fails to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to the defendant; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. 373 U.S. 83, 87 (1963); *see United States v. Bagley*, 473 U.S. 667, 675 (1985); *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

At the trial court's hearing on his application for writ of habeas corpus, Walker was asked by his counsel if he had any "thoughts or ideas" as to any possible grounds for appeal. Walker testified that he had "requested some evidence to be presented to me from the prosecutor on the medical records" and the judge "had told the prosecutor to deliver those [sic] evidence to me so that we could review it for my defense," but that "[w]e never received it." When asked what was in the medical records he sought, Walker stated:

> Ms. Tovar had said that I had committed some bruises or some marks on her and she had told me that prior, the day before she had left, that she got in a fight with her sister and her sister had cut her and fought with her and I believe that she got her bruise from there. And the testimony when you go in to the doctors will tell you what your causes, why you came in, I never received that report.

Walker further testified that he "had asked for some witnesses to come in my behalf that had direct relations or saw the incident" as well as "when I reported to the police station when the officers, the bruises and the marks, to take pictures they had took of me on the phone and they were never received."

Walker's trial counsel testified at the habeas hearing that he erroneously missed the deadline for filing a notice of appeal, and that he believed an appeal would be warranted on this issue in part because the issue had been preserved at trial by a timely objection and adverse ruling.[3]

On appeal, Walker references his testimony and his trial counsel's testimony at the habeas hearing, but he does not direct us to any point in the trial record where trial counsel made any complaint regarding withheld exculpatory evidence, and we find none. Accordingly, the issue has not been preserved for appellate review. *See* TEX. R. APP. P. 33.1(a) (stating that, as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion which the trial court implicitly or explicitly ruled on); *cf. Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App. 2011) (applying Rule 33.1(a) to a *Brady* complaint and concluding that appellant preserved the complaint by referring to "material" and "exculpatory" evidence at the motion for new trial hearing).[4] Even if the issue had been preserved, the record does not show that the State was in possession of the records Walker claims were withheld. *See Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. at 675. We overrule Walker's fourth issue.

[3] Walker's trial counsel explained, at the habeas hearing, that the trial prosecutor had interpreted a discovery agreement as allowing the State to withhold exculpatory evidence on the basis of waiver, which he argued was impermissible under *Brady*.

[4] Trial counsel filed a motion for new trial in this case, but it did not allege that exculpatory evidence had been withheld.

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Justice

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

Delivered and filed the
22nd day of June, 2017.