NUMBER 13-23-00175-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ERIC ESTRADA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

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

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Benavides

Appellant Eric Estrada entered open pleas of guilty to one count of continuous sexual abuse of a young child, a first-degree felony; one count of sexual assault of a child, a second-degree felony; and one count of indecency with a child by contact, also a second-degree felony. *See* TEX. PENAL CODE ANN. §§ 21.02(b), 21.11(a)(1), 22.011(a)(2).

After a contested punishment hearing, the trial court assessed punishment at forty-five years' confinement for the first-degree felony and fifteen years for each second-degree felony, with the sentences to be served consecutively.

On appeal, Estrada argues that his plea was involuntary because the trial court failed to admonish him in writing as to the proper punishment range for continuous sexual abuse of a young child. Specifically, the written admonishment signed by Estrada prior to the plea hearing included the normal punishment range for a first-degree felony, rather than the enhanced punishment range for continuous sexual abuse of a young child. *See id.* § 21.02(h). The State responds that the error was rendered harmless because, during the subsequent plea hearing, the State informed Estrada of the correct punishment range, and Estrada confirmed that he understood the potential range of punishment before entering his plea. We affirm.

I. BACKGROUND

Prior to the commencement of the plea hearing, Estrada signed a document titled "Plea Memorandum," which stated, among other things, that "the Court has made the admonishments required by Article 26.13 of the Texas Code of Criminal Procedure (C.C.P.) in writing as set out on Exhibit A attached hereto . . . and that [Estrada] understands the admonishments and is aware of the consequences of [his] plea." The attached Exhibit A identified the three offenses, and included the following admonishment:

> The range of punishment attached to the above offense[s] . . . is checked below:
>
> (X) **First Degree Felony (Penal Code § 12.32):** imprisonment in

the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years; and in addition, a fine may be assessed not to exceed $10,000.

(X) **Second Degree Felony (Penal Code § 12.33):** imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years; and in addition, a fine may be assessed not to exceed $10,000.

During the plea hearing, the following exchange occurred:

THE COURT: Okay. Now, just so I'm clear, after we've done the amendment,[1] so Count 1 would be a first-degree felony; is that correct?

[STATE]: *It is a first degree with a different range of punishment. It's 25 to 99 or life, your Honor.*

THE COURT: Okay. And then the remaining counts after the amendment?

[STATE]: . . . . [T]hose are second degrees, both.

THE COURT: Okay. And a second-degree felony carries with it a range of punishment of 2 to 20 years in TDCJ and a fine not to exceed $10,000.

So do you understand those potential ranges of punishment, both for Count 1 and Count 7 and 8?

[ESTRADA]: Yes, your Honor.

THE COURT: And you talked with [your attorney] about that[?]

[ESTRADA]: Yes, your Honor.

(Emphasis added). Shortly thereafter, Estrada pleaded guilty to the three offenses. The trial court took the pleas under advisement and scheduled a punishment hearing for a

[1] The indictment originally contained eight separate counts, involving two different victims. Count 1 concerned the continuous sexual abuse charge against the first victim. Counts 7 and 8 concerned the sexual assault of a child and indecency with a child by contact charges against the second victim. The State abandoned the other counts, and the indictment was amended accordingly.

later date.

Prior to the punishment hearing, the State filed a "Motion Seeking Findings & Cumulated Sentencing." Within the motion, the State correctly stated the applicable range of punishment for continuous sexual abuse of a young child and prayed for a maximum sentence on each count "to be served consecutively." At the conclusion of the punishment hearing, the trial court found Estrada guilty of the three offenses, assessed his punishment as described above, and ordered that the sentences be served consecutively.

Twenty-one days later, the trial court received a pro se letter from Estrada expressing his desire to appeal his convictions and his dissatisfaction with his trial counsel's representation. That same day, the trial court appointed Estrada appellate counsel, and this appeal followed.

II. ANALYSIS

Estrada contends that his guilty plea—at least as to the continuous sexual abuse charge—was not voluntary under the Due Process Clause because the trial court failed to comply with Article 26.13. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) ("Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of . . . the range of the punishment attached to the offense . . . ."). But as the State correctly points out, "any claim that the trial court failed to follow the mandate of [Article 26.13] is separate from the claim that the guilty plea was accepted in violation of due process." *Davison v. State*, 405 S.W.3d 682, 687 (Tex. Crim. App. 2013). Indeed, because a complaint concerning the trial court's failure to admonish under Article 26.13 "is predicated solely upon a statutory violation, the standard for determining harm that

pertains to claims of non-constitutional error applies—Rule 44.2(b)." *Id.* Thus, in our sole discretion, we will separately examine Estrada's issue under both the Due Process Clause and Article 26.13.

A. No Due Process Violation

"A criminal defendant who enters a plea of guilty has by definition relinquished his Sixth Amendment rights to a trial by jury and to confront the witnesses against him, as well as his Fifth Amendment privilege against self-incrimination." *Id.* at 686. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Accordingly, "[a] criminal defendant who is induced to plead guilty in state court in total ignorance of the precise nature of the charge and the range of punishment it carries has suffered a violation of procedural due process." *Davison*, 405 S.W.3d at 686.

"[T]he record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Id.* at 687 (quoting *Brady*, 397 U.S. at 747 n.4.). "Although the statute is obviously intended to facilitate the entry of adequately informed pleas of guilty or nolo contendere," a trial court's failure to comply with Article 26.13 is not itself sufficient to establish a due process violation. *Id.* (citing *Aguirre-Mata v. State*, 125 S.W.3d 473, 475–76 (Tex. Crim. App. 2003)). "So long as the record *otherwise* affirmatively discloses that the defendant's guilty plea was adequately informed, due process is satisfied." *Id.*

Here, the written admonishment signed by Estrada prior to the commencement of

the plea hearing incorrectly informed him that the range of punishment for continuous sexual assault of a young child was imprisonment for "life or for any term of not more than 99 years or less than 5 years," when, in fact, the range of punishment for this offense is imprisonment for "life, or for any term of not more than 99 years *or less than 25 years*." TEX. PENAL CODE ANN. § 21.02(h) (emphasis added). Nevertheless, during the punishment hearing, the State informed Estrada of the correct punishment range, and Estrada confirmed to the trial court that he understood the punishment range for the offense and that he had previously discussed it with his attorney. Significantly, Estrada received this warning after the written admonishment and just moments before entering his plea. Therefore, despite the mistake in the initial written admonishment, the record demonstrates that Estrada was otherwise adequately informed of the consequences of his plea at the time he entered it. *See Davison*, 405 S.W.3d at 687.

Moreover, nothing in the record suggests that Estrada was confused by the discrepancy between the written admonishment and the subsequent warning. Estrada asks us to consider the contents of his pro se letter to the trial court as proof that he did not fully appreciate the consequences of his plea. The State argues that the letter is no proof at all because it was unverified and should thus be treated as nothing more than a notice of appeal. *See Klapesky v. State*, 256 S.W.3d 442, 454 (Tex. App.—Austin 2008, pet. ref'd) ("Although it is not specifically required by statute or the Texas Rules of Appellate Procedure that a motion for new trial be supported by an affidavit, Texas courts, by judicial fiat, have long held that when the grounds for a new trial are outside the record, a defendant must support his motion by his own affidavit or by the affidavit of someone

with knowledge of the facts." (collecting cases)).

Even if we assume that the allegations in the letter are properly before us, they do not rebut Estrada's clear affirmation on the record that he understood the correct punishment range for continuous sexual abuse of a young child before entering his plea. Instead, Estrada explains in his letter that, as a lay person, he was relying on his trial counsel's expertise, and he believes that his trial counsel gave him bad advice about entering an open plea, rather than taking the case to trial. He also complains that, despite his expectations, his trial counsel never obtained a plea bargain offer for him to consider. Whatever complaints Estrada may have about the effectiveness of his trial counsel, they are not germane to the issue on appeal.

We conclude that Estrada's plea of guilty to the offense of continuous sexual abuse of a young child was made knowingly and intelligently and is therefore constitutionally firm. *See Brady*, 397 U.S. at 748. Estrada's first sub-issue is overruled.

B. Article 26.13 Violation was Harmless

As previously mentioned, Article 26.13 mandates that "[p]rior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of . . . the range of the punishment attached to the offense." TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1)). The trial court may do so "either orally or in writing." *Id.* art. 26.13(d). A trial court's substantial compliance with this requirement "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). Moreover, because a violation of Article 26.13 is subject to a harmless error analysis, "a reviewing

court must look to the record as a whole to determine whether the defendant was aware of the particular information upon which he should have been admonished—notwithstanding the lack of an admonishment—prior to the time that the trial court accepted his plea." *Davison*, 405 S.W.3d at 688.

The record does not show that Estrada was misled or harmed by the trial court's initial written admonishment. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c). To the contrary, as discussed above, the record affirmatively demonstrates that Estrada was aware of the correct punishment range before the trial court accepted his plea. *See id.*; *Davison*, 405 S.W.3d at 688; *Aguirre-Mata*, 125 S.W.3d at 476–77 (finding harmless error under Article 26.13 because "[t]he record contains other references to the correct punishment range and there is nothing in the record that shows appellant was unaware of the consequences of his plea or that he was misled or harmed"). Therefore, the trial court's initial error under Article 26.13 was rendered harmless, and Estrada's second sub-issue is overruled.

C. No Error for Failing to Admonish on Possibility of "Stacking"

Finally, Estrada also points out that he was never formally admonished or warned that the trial court could order his sentences to be served consecutively, as occurred in this case. Estrada argues that without this information, he could not make an informed decision about the potential consequences of his guilty pleas. The State responds that: (1) it filed a motion before the punishment hearing alerting Estrada to this very possibility; (2) there is no statutory requirement that a defendant be admonished about this possible outcome; and (3) a defendant is not otherwise entitled to this information for his plea to

be considered voluntary. Again, we agree with the State.

It is unclear from the record whether Estrada had actual knowledge of the State's motion. Regardless, there is no requirement under Article 26.13 that the defendant be formally admonished that the trial court has authority to cause his sentences to run consecutively. *Simmons v. State*, 457 S.W.2d 281, 283 (Tex. Crim. App. 1970) ("We do not agree that Article 26.13 . . . obligates the trial court to inform an accused pleading guilty or nolo contendere of its discretion to cumulate sentences when admonishing him of the consequences of his plea."); *see* TEX. CODE CRIM. PROC. ANN. art. 26.13. Further, this Court has held that the imposition of consecutive sentences is a collateral, rather than direct, consequence of a guilty plea, and as such, the trial court's failure to warn the defendant of this possibility does not undermine the constitutionality of his plea. *McGrew v. State*, 286 S.W.3d 387, 391 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.). Estrada's sole issue on appeal is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES
Justice

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

Delivered and filed on the
31st day of August, 2023.