NO. 12-11-00039-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CLINT FRANK VILLANUEVA, APPELLANT	***§***	***APPEAL FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Clint Frank Villanueva appeals his conviction for driving while intoxicated (DWI) with a child passenger under the age of fifteen. He raises three issues on appeal. We affirm.

BACKGROUND

Appellant was indicted for driving while intoxicated with a child passenger. In January 2010, he pleaded guilty to the offense, and "true" to a deadly weapon enhancement. The trial court accepted Appellant's guilty plea, found the enhancement allegation to be "true," and made an affirmative deadly weapon finding. The trial court sentenced Appellant to six years of imprisonment.

Appellant filed a motion for new trial. The trial court ruled that it did not have jurisdiction to hear the motion, and Appellant appealed to this court. We held that the trial court had jurisdiction, abated the appeal, remanded the case, and ordered the trial court to hold a hearing on the motion. The trial court held the hearing, denied Appellant's motion for new trial, and issued extensive written findings of fact and conclusions of law. After receiving a supplemental clerk's record and reporter's record from the hearing, we reinstated the appeal.

MOTION FOR NEW TRIAL

In his first issue, Appellant argues that the trial court erred in denying his motion for new trial because his guilty plea was rendered involuntary due to ineffective assistance of counsel. He explains that his counsel advised him, prior to the entry of his plea, that he was eligible for, and would likely receive, community supervision. After the trial court accepted the plea and made an affirmative deadly weapon finding, he learned that counsel's advice was incorrect. Appellant urges that he would not have pleaded guilty had he been given correct advice.

Standard of Review

The Texas Court of Criminal Appeals recently reviewed a trial court's denial of a motion for new trial that was based on an ineffective assistance claim. *See generally* ***Riley v. State***, No. PD–1531–11, ___ S.W.3d ___, 2012 WL 4092874 (Tex. Crim. App. Sept. 19, 2012). Similar to Appellant's argument in this case, the appellant in ***Riley*** argued that the trial court erred in overruling his motion for new trial, arguing that counsel incorrectly advised him that he would be eligible for community supervision. Before addressing the issue, the court explained the standard of review as follows:

> An appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if the trial judge's opinion was clearly erroneous and arbitrary. A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. This deferential review requires the appellate court to view the evidence in the light most favorable to the trial court's ruling. The appellate court must not substitute its own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

Id. at *2.

Applicable Law

Claims of ineffective assistance of counsel are evaluated under the two step analysis articulated in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). The first step requires an appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 688, 104 S. Ct. at 2065; ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Counsel's representation is not reviewed for isolated or incidental deviations from professional

norms, but on the basis of the totality of the representation. *See* ***Strickland***, 466 U.S. at 695, 104 S. Ct. at 2069.

The second step requires the appellant to show prejudice from the deficient performance of his attorney. *See* ***Hernandez v. State***, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, an appellant must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

We begin with the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See* ***Jackson v. State***, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). An appellant has the burden of proving ineffective assistance of counsel and must overcome the presumption that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id***. (internal quotations omitted).

An involuntary guilty plea must be set aside. *See* ***Boykin v. Alabama***, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713, 23 L. Ed. 2d 274 (1969); ***Williams v. State***, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). To determine if a plea is voluntary, we consider the record as a whole. ***Williams***, 522 S.W.2d at 485. In some instances, a guilty plea may be involuntary if counsel conveys erroneous information to the defendant. *See* ***Tollett v. Henderson***, 411 U.S. 258, 266–67, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973); ***Ex parte Moody***, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999) ("Even when a defendant wholly relies upon erroneous advice of counsel, the magnitude of the error as it concerns the consequences of the plea is a relevant factor; not every reliance on erroneous advice is sufficient to justify rendering the plea vulnerable to collateral attack."); ***Ex parte Griffin***, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984). A plea of guilty is not rendered involuntary merely because the defendant received a greater punishment than anticipated or because he did not consider every relevant factor when making his decision to plead guilty. ***Lemmons v. State***, 133 S.W.3d 751, 757 (Tex. App.—Fort Worth 2004, pet. ref'd).

To show that a guilty plea is involuntary due to ineffective assistance of counsel, the defendant must show that counsel's advice was outside the range of competency demanded of attorneys in criminal cases and that, but for counsel's erroneous advice, the defendant would not have pleaded guilty and would instead have gone to trial. ***Ex parte Moody***, 991 S.W.2d at 857-58. "[A] defendant's claim [that] he was misinformed by counsel, standing alone, is not enough for us

to hold his plea was involuntary." ***Fimberg v. State***, 922 S.W.2d 205, 208 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd).

Discussion

At the motion for new trial hearing, Appellant and his trial counsel testified that, prior to the plea hearing, the State offered Appellant a four year sentence in exchange for his guilty plea. Appellant rejected that offer, but later made an open plea of "guilty" to the trial court. Appellant testified at the plea hearing that he was pleading guilty because he expected to receive probation. The trial court further questioned Appellant, who stated he understood community supervision may be an option but the trial court was under no obligation to place him on community supervision. It appears from the record that Appellant and his trial counsel operated under the assumption that Appellant would be eligible for community supervision at the time. That would have been true, except that Appellant became ineligible for community supervision at the conclusion of the punishment phase when the trial court made an affirmative deadly weapon finding. Appellant nevertheless pleaded "true" to the deadly weapon allegation.

The trial court, in its extensive written findings of fact and conclusions of law, found that Appellant's trial counsel was indeed ineffective in failing to recognize and advise Appellant that an affirmative deadly weapon finding would render Appellant ineligible for community supervision. Neither party challenges this finding on appeal. The issue on appeal is whether Appellant can show that he was harmed by counsel's deficient performance as required under the second prong of ***Strickland***.

Appellant executed an affidavit in which he claimed that counsel advised him that he would receive community supervision. Appellant made the same contention during his testimony at the motion for new trial hearing. In his affidavit, Appellant stated that he would have insisted on a jury trial and would not have pleaded guilty had he been correctly informed of the law, but did not testify to that in court at the motion for new trial hearing. In its findings of fact and conclusions of law, the trial court found Appellant and his affidavit not credible and reliable due to several inconsistencies. The credibility of witnesses who testify at a motion for new trial hearing is primarily a determination for the trial court. *See* ***Lewis v. State***, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). The trial court may also, in its role as factfinder, choose to disbelieve and disregard the appellant's affidavit. ***Riley***, 2012 WL 4092874, at *2-4. In any event, Appellant's affidavit was

not admitted formally into evidence at the motion for new trial hearing.

At the hearing on the motion for new trial, Appellant's trial counsel testified that she advised Appellant to plead guilty and hoped that he would be able to receive community supervision. She testified that the evidence against him was overwhelming. She testified that she explained the State had the burden of proving the deadly weapon allegation and that the State would likely be able to secure an affirmative finding on that issue. Particularly, she testified that Appellant's arrest came about because a concerned citizen called 911 and stated that he or she had followed Appellant, his driving was erratic, and that he narrowly missed causing an accident with another vehicle. Appellant admitted during his testimony that the arrest video showed he had been drinking and also that he should not have been driving. After initially denying it, he also admitted lying to police concerning what he had been doing prior to his detention. He initially told officers that he had just taken one of his children to the hospital because the child was sick, when in fact he had come from picking his children up at Chuck E. Cheese after he had been drinking at a local bar. Trial counsel testified that these facts rendered a trial undesirable. She also stated that a guilty verdict and affirmative finding on the deadly weapon allegation were very likely.

Because of these facts, Appellant cannot show that but for counsel's erroneous advice, he would have pleaded "not guilty," and would instead have gone to trial. *See* ***Ex parte Harrington***, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010). In other words, had counsel correctly advised Appellant that he would be ineligible for community supervision with an affirmative deadly weapon finding, it is just as likely that Appellant still would have pleaded "guilty" and accepted the State's initial offer of four years of imprisonment rather than face a trial. There is nothing in the record to indicate to the contrary. Therefore, Appellant cannot meet the prejudice prong of the ***Strickland*** test, and his ineffective assistance claim must fail. The trial court properly denied Appellant's motion for new trial on this basis.

Appellant's first issue is overruled.

ADMONISHMENTS ON RANGE OF PUNISHMENT

In his second issue, Appellant argues that his plea of guilty was involuntary, alleging that the trial court failed to adequately admonish him in substantial compliance with Texas Code of Criminal Procedure Article 26.13. Specifically, Appellant maintains that the trial court should

have admonished him concerning the unenhanced range of punishment.

Standard of Review and Applicable Law

A guilty plea shall not be accepted by the trial court unless it appears the plea is free and voluntary. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West Supp. 2012). If the trial court properly admonished the defendant before a guilty plea was entered, a prima facie showing has been made that the plea was both knowing and voluntary. ***Martinez v. State***, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (per curiam). In pertinent part, Article 26.13 of the Texas Code of Criminal Procedure provides that "[i]n admonishing the defendant[,] . . . substantial compliance by the court 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." TEX. CODE CRIM. PROC. ANN. art. 26.13(c).

Once substantial compliance has been shown, the burden shifts to the defendant to show (1) he pleaded guilty without understanding the consequences of his plea; and (2) he was misled or harmed by the admonishment of the court. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c); ***Martinez***, 981 S.W.2d at 197. When considering the voluntariness of a guilty plea, an appellate court must examine the entire record. *See* ***Martinez***, 981 S.W.2d at 197. A plea is not rendered involuntary simply because a defendant received a greater punishment than he anticipated. *See* ***Tovar-Torres v. State***, 860 S.W.2d 176, 178 (Tex. App.—Dallas 1993, no pet.); ***Rice v. State***, 789 S.W.2d 604, 607 (Tex. App.—Dallas 1990, no pet.).

Driving while intoxicated with a child passenger is ordinarily a state jail felony offense. TEX. PENAL CODE ANN. § 49.045 (West 2011). However, an individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown that he used or exhibited a deadly weapon during the commission of the offense. *See* TEX. PENAL CODE ANN. § 12.35(c)(1) (West Supp. 2012).

Discussion

In the instant case, the trial court admonished Appellant orally that the punishment range was that of a third degree felony due to the enhancement, or two to ten years of imprisonment. The misstatement, if it can be so characterized, was that the trial court did not admonish Appellant as to the punishment range in the event the deadly weapon allegation was found to be untrue. We note that the trial court's statement as to the range of punishment occurred at the outset of Appellant's

guilty plea hearing, and consequently, the range of punishment was misstated only because a plea of "true" to the deadly weapon allegation had yet to occur. The admonishment was correct for the actual punishment range of the enhanced offense.

The better practice is to admonish the defendant concerning both the unenhanced and the enhanced range of punishment. *See* ***Harvey v. State***, 611 S.W.2d 108, 112 (Tex. Crim. App. 1981). The failure to do so does not necessarily require reversal on appeal, however. The Texas Court of Criminal Appeals has held that a trial court substantially complies with Article 26.13 when the actual sentence given was within the range of the erroneous admonishment. ***Martinez***, 981 S.W.2d at 196. "When a record shows that the trial court delivered an incorrect admonishment regarding the range of punishment, and the actual sentence lies within both the actual and misstated maximum, substantial compliance is attained." ***Id***. at 197.

The Texarkana Court of Appeals has analyzed an analogous case under the ***Martinez*** standard. *See* ***Nichols v. State***, 349 S.W.3d 612, 613, 616 (Tex. App.—Texarkana 2011, pet. ref'd). In that case, the appellant was indicted for aggravated assault with a deadly weapon, which ordinarily would be a second degree felony, carrying a punishment range of two to twenty years of imprisonment. ***Id***. at 616. However, the indictment also contained an enhancement paragraph that, if proven, would have raised the punishment range to that of a first degree felony, which was between five to ninety-nine years of imprisonment or life. ***Id***. The trial court admonished the appellant only on the enhanced penalty range, and nothing was said concerning the range of punishment that would be possible without the enhancement. ***Id***. The appellant made an open plea of guilt and pleaded true to the enhancement paragraph. The trial court sentenced him to fifty years of imprisonment. ***Id***. at 613. The appellate court applied ***Martinez*** and held that since "the actual sentence lies within both the actual and 'misstated' maximum range[,] the trial court substantially complied." ***Id***. at 616. We are bound by ***Martinez***, and the analysis applied to a similar fact pattern in ***Nichols*** is persuasive here.

Moreover, in another case, the appellant complained that the trial court failed to substantially comply with Article 26.13. *See* ***Teamer v. State***, 557 S.W.2d 110, 111 (Tex. Crim. App. 1977). He argued the trial court should have admonished him on the punishment range for a third degree felony. ***Id***. Instead, the trial court admonished him on the punishment range for a second degree felony because he was also pleading true to an enhancement paragraph. ***Id***. The

court of criminal appeals concluded that the punishment range given was correct for a third degree felony with an enhancement and therefore the trial court substantially complied with Article 26.13. ***Id***.

In the instant case, the trial court sentenced Appellant to six years of imprisonment, which is within the statutory range for DWI with a child passenger with an affirmative deadly weapon finding. Under the ***Martinez*** and ***Teamer*** standards, the trial court substantially complied with Article 26.13 by informing Appellant of the punishment range for the enhanced offense he committed. Because the trial court substantially complied, the burden shifted to Appellant to show he did not understand the consequences of his guilty plea and to show how he was harmed by the incorrect admonishment. *See* ***Martinez***, 981 S.W.2d at 197.

In this context, "harm" means that the "appellant probably would not have pleaded guilty but for the failure to admonish." ***Burnett v. State***, 88 S.W.3d 633, 638 n.14 (Tex. Crim. App. 2002). "When there is insufficient admonition, whether by total failure to admonish or an admonition that is not in substantial compliance, the violation of Article 26.13 comes within the standard of Rule of Appellate Procedure 44.2(b): 'Any other [than constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.'" ***Anderson v. State***, 182 S.W.3d 914, 918 (Tex. Crim. App. 2006) (quoting TEX. R. APP. P. 44.2(b)). We will not overturn the conviction unless, after examining the record as a whole, we conclude that the error may have had a "substantial influence" on the outcome of the proceeding. ***Burnett***, 88 S.W.3d at 637. In other words, if we have a "grave doubt" about whether the conviction was free from the substantial influence of the error, we must treat the error as if it was not. ***Id***. "Grave doubt" occurs when the matter is so evenly balanced that the reviewing court believes the record is "in virtual equipoise as to the harmlessness of the error." ***Id***. at 637–38.

Appellant stated at the guilty plea hearing that he understood his rights, and that he pleaded guilty freely and voluntarily. He also testified that he was satisfied with his counsel's representation. The record shows that Appellant was offered a plea bargain of four years of imprisonment, but rejected that offer because he "had kids to take care of." It was not until he received a longer sentence of imprisonment that he raised this issue. We cannot say, after reviewing the record, that Appellant would have not pleaded guilty had the trial court admonished him on the unenhanced punishment range. It is just as likely that he would have accepted the

State's initial offer, especially since, as we have noted, the evidence of guilt was strong.

Appellant's second issue is overruled.

ADMONISHMENTS ON COMMUNITY SUPERVISION ELIGIBILITY

In his third issue, Appellant contends his guilty plea was not freely and voluntarily given because the trial court erroneously advised him on his eligibility to receive community supervision. Specifically, Appellant alleges that the trial court advised him that community supervision was available, when in fact it was not due to the affirmative finding on the deadly weapon allegation.

Standard of Review and Applicable Law

Prior to accepting a plea of "guilty" or "no contest," a trial court shall admonish an accused as to the range of punishment, in addition to other consequences of his plea. TEX. CODE CRIM. PROC. ANN. art. 26.13(a). However, there is no mandatory duty for the trial court to admonish an accused as to eligibility for community supervision. *See* ***Harrison v. State***, 688 S.W.2d 497, 499 (Tex. Crim. App. 1985). If a trial court volunteers an admonishment as to the availability of community supervision, the trial court has a duty to accurately admonish the accused. *See* ***Ex parte Williams***, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986). A defendant's plea is involuntarily induced if the record shows (1) the trial court volunteered an admonishment that included information on the availability of community supervision, which creates an affirmative duty for the trial judge to provide accurate information on the availability of community supervision; (2) the trial court provided inaccurate information on the availability of community supervision, leaving the accused unaware of the consequences of his plea; and (3) the accused was misled or harmed by the inaccurate admonishment. ***Tabora v. State***, 14 S.W.3d 332, 334 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In determining whether a plea is involuntary, we consider the record as a whole. ***Williams v. State***, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975).

As we have mentioned, a DWI with a child passenger is ordinarily a state jail felony offense, but is enhanced to a third degree felony if there is an affirmative deadly weapon finding. TEX. PENAL CODE ANN. § 49.045; ***id.*** § 12.35(c)(1). An affirmative deadly weapon finding renders a defendant ineligible for judge-ordered community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2) (West Supp. 2012).

Discussion

Appellant contends that the trial court erroneously advised him that community supervision was an option when it was not, due to the affirmative deadly weapon finding. Consequently, Appellant's argument continues, his guilty plea was rendered involuntary. Soon after Appellant made an open plea of guilty and pleaded true to the deadly weapon allegation, the following colloquy took place:

> [Trial Court:] You've entered a plea of guilty to the charged offense in this case. Are you pleading guilty today because you are guilty and not for any other reason?
>
> [Appellant:] Yes.
>
> [Trial Court:] Nobody has threatened you or promised you anything to get you to plead guilty?
>
> [Appellant:] No, ma'am.
>
> [Trial Court:] I have a feeling [defense counsel] is going to ask me to put you on probation. I think the State is going to ask me to send you to the penitentiary. Sometimes that's just how it works out. I don't have a crystal ball. That's just how it happens sometimes. Has anybody promised you that you will for sure get probation in this case?
>
> [Appellant:] No.
>
> [Trial Court:] That you will probably get probation in this case?
>
> [Appellant:] Hopefully.
>
> [Trial Court:] Hopefully. But nobody has said you're going to get probation?
>
> [Appellant:] No, ma'am.
>
> [Trial Court:] Nobody has said you're definitely going to not get probation, have they?
>
> [Appellant:] Yes, ma'am.
>
> [Trial Court:] Well, I need to know, Mr. Villanueva. Has anybody told you you're going to get probation?
>
> [Appellant:] They're saying I can, but it's a possibility that I can't.
>
> [Trial Court:] Right. It's an option.
>
> [Appellant:] I want to get probation.
>
> [Trial Court:] I understand that. You understand it's an option, though?
>
> [Appellant:] Yes, ma'am.

> [Trial Court:] You understand that the court does not have to grant probation? You understand that?
>
> [Appellant:] Yes, ma'am.
>
> [Trial Court:] And nobody has promised you that you're going to get probation?
>
> [Appellant:] No, ma'am. Nobody promised me.
>
> [Trial Court:] Has anybody told you you're probably going to get probation?
>
> [Appellant:] No. No, ma'am.
>
> [Trial Court:] All right. I just want to make sure, Mr. Villanueva, because it's important for today and it's important for other days just to have it straight that you're entering your plea today because you are guilty and not because somebody has promised you or threatened you with something. Do you understand that?
>
> [Appellant:] Yes ma'am.
>
> [Trial Court:] All right. The reason you're entering your plea of guilty today is because you are guilty and not for any other reason?
>
> [Appellant:] Yes, ma'am.
>
> [Trial Court:] All right. The Court finds that your plea is made freely, knowingly, intelligently and voluntarily and that you're entering your plea of guilty today because you are guilty and not for any other reason.

However, at that time of the discussion, the trial court did not actually make a finding of guilt, nor did it make an affirmative deadly weapon finding. Instead, it allowed the State to enter Appellant's waivers, and stipulation of evidence, as well other evidence, and then found that there was sufficient evidence to substantiate Appellant's guilty plea. The trial court stated that "[t]he Court does find sufficient evidence to substantiate your plea of guilty. The Court is now going to hear evidence on punishment in your case." The trial court held the punishment phase of Appellant's trial. At the conclusion of that phase, the trial court made the finding of guilt and the affirmative deadly weapon finding, and pronounced Appellant's sentence.

A trial court's oral finding of guilt alone does not amount to an affirmative finding that the defendant used a deadly weapon; therefore, a defendant is not rendered ineligible for community supervision until the finding is actually made. *See* ***Rodriguez v. State***, 933 S.W.2d 702, 705 (Tex. App.—San Antonio 1996, pet. ref'd); ***Graves v. State***, 803 S.W.2d 342, 343 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd). In addition, the trial court, in a bench trial, has complete discretion to refuse to make an affirmative deadly weapon finding, even though the state has met its burden of

proof on the deadly weapon issue. ***Shute v. State***, 945 S.W.2d 230, 232 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd); ***Campos v. State***, 927 S.W.2d 232, 236 (Tex. App.—Waco 1996, no pet.) (although defendant was indicted for use of a deadly weapon and pleaded nolo contendere to accusations, making of affirmative deadly weapon finding was matter for trial court's discretion); ***Ex parte Lucke***, 742 S.W.2d 818, 820 (Tex. App.—Houston [1st Dist.] 1987, no pet.) (holding defendant was eligible for probation even though defendant admitted use of deadly weapon, because "trial court, as trier of fact, . . . simply declined to enter the additional affirmative finding in the judgment"). Since the trial court had not made the finding at the time of Appellant's plea, community supervision was an option, even though he pleaded "true" to the deadly weapon allegation. The trial court could have found the deadly weapon allegation to be untrue. Therefore, the trial court did not misadvise Appellant on the availability of community supervision. *See*, *e.g.*, ***Rodriguez***, 933 S.W.2d at 705.

Moreover, Appellant had already decided to plead guilty to the charge and true to the deadly weapon allegation before the trial court raised the possibility of community supervision. Therefore, he could not have been harmed by any confusion created as to the possibility of community supervision when the trial court raised the issue. ***Miller v. State***, No. 06-03-00179-CR, 2004 WL 360286, at *1-2 (Tex. App.—Texarkana Feb. 27, 2004, pet. ref'd) (mem. op., not designated for publication) (holding defendant failed to prove harm when trial court suggested community supervision was available when it was not, because defendant already pleaded guilty before issue was raised by trial court).

Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the judgment of the trial court.

SAM GRIFFITH
Justice

Opinion delivered October 17, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

OCTOBER 17, 2012

NO. 12-11-00039-CR

CLINT FRANK VILLANUEVA,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 114-1636-10)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.