NO. 12-11-00041-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MICHAEL ALLYN KENNEDY, APPELLANT	***§***	***APPEAL FROM THE THIRD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Michael Allyn Kennedy appeals from the sentencing phase of his trial for theft at which the jury set punishment at ninety-nine years of imprisonment and a $10,000.00 fine. After careful consideration of each of Appellant's twenty-seven issues, we affirm the trial court's judgment.

BACKGROUND

After a jury trial, Appellant was found guilty of theft of property worth more than $1,500.00 and less than $20,000.00. The indictment alleged that the victim was elderly, which elevated the punishment range from that of a state jail felony to that of a third degree felony. Additionally, the State alleged that Appellant had two prior felony convictions. The jury assessed punishment at imprisonment for sixty-two years and a fine of $10,000.00. Appellant appealed, and this court affirmed the conviction for theft. Because the record did not show that one of the convictions used to enhance the sentence was a final conviction, this court reversed the judgment with respect to the punishment imposed and remanded to the trial court for a new punishment hearing. *See* ***Kennedy v. State***, No. 12-08-00246-CR, 2009 Tex. App. LEXIS 9514 (Tex. App.–Tyler Dec. 16, 2009, no pet.) (mem. op., not designated for publication).

A second jury trial on punishment was held on January 26, 2011, at which Appellant

represented himself. After hearing the evidence, the jury sentenced Appellant to ninety-nine years of imprisonment and a $10,000.00 fine.

MOTION TO RECUSE TRIAL JUDGE

In his eleventh issue, Appellant contends that "[m]otion by pro se defendant not untimely when the trial court have counsel appointed and motion to recuse trial judge required a hearing." He explains that his first motion to recuse was filed on August 26, 2010, but the motion was not ruled on until January 25, 2011.

The procedures set out in Texas Rule of Civil Procedure 18a for the recusal of judges apply in criminal cases. *See* ***Green v. State***, Nos. AP-76,374, AP-76,376, AP-76,381, 2012 Tex. Crim. App. LEXIS 866, at *24-25 (Tex. Crim. App. June 27, 2012). Rule 18a(b) requires the motion to be filed at least ten days before the date set for trial. TEX. R. CIV. P. 18a(b). Further, the motion must be verified, must state with particularity the grounds why the judge before whom the case is pending should not sit, must be made on personal knowledge, and shall set forth such facts as would be admissible in evidence. TEX. R. CIV. P. 18a(a). Rule 18a(f) provides that, whenever a motion to recuse is filed, the judge must either recuse himself or request the presiding judge of the administrative judicial region to assign a judge to hear such motion. TEX. R. CIV. P. 18(f).

Appellant filed pro se motions to recuse the trial judge, and others, on August 26, 2010, December 13, 2010, January 18, 2011, and January 25, 2011. At the hearing on January 25, the trial judge initially denied the motions as untimely. Later in the hearing, he decided to fax the motions to the presiding judge of the First Administrative Region requesting assignment of a judge to hear the motions. That same day, the presiding judge signed an order denying Appellant's motion to recuse the trial judge.

The January 18 and January 25 motions were properly denied as untimely. *See* TEX. R. CIV. P. 18a(b). Further, all of the motions complain of the trial judge's previous rulings and make generalized complaints that the judge has engaged in racial discrimination and official misconduct. Thus, the motions do not set out with sufficient particularity the grounds why the trial judge should be recused. Additionally, the motions are not verified. Because the motions to recuse do not comply with the requirements of Rule 18a, neither the trial judge nor the presiding judge of the First Administrative Region erred in denying Appellant's motions to recuse the trial judge. *See* TEX. R. CIV. P. 18(a). We overrule Appellant's eleventh issue.

MOTION FOR CONTINUANCE

In his first, second, eighteenth, and twentieth issues in his original brief and his first and fifth issues in his supplemental brief, Appellant asserts that the trial court erred in not giving him a continuance of ten days once his appointed counsel was allowed to withdraw. He argues he needed the ten days to review the State's file and witnesses, investigate the case, prepare for trial, and file written pleas. He points out that he filed a motion for discovery on October 14, 2010, requesting the victim's bank records, the court reporter's records, and the clerk's records. He also contends he should have been given ten days notice of the State's intention to submit enhancement paragraphs to the jury so he could prepare his defense to those allegations. He claims to have been surprised by the State's witnesses and the enhancement allegations. He argues that the trial court's denial of his motion for continuance was a denial of due process. Additionally, in part of his argument in his seventh issue, Appellant asserts the trial court erred in denying his motion for continuance because State's witness Chris Dobbs was not disclosed ten days before trial.

Time to Prepare for Trial

Appellant cites to code of criminal procedure article 28.10 in support of his argument that he was improperly denied a ten day continuance. That article provides that a defendant is allowed ten days to respond when the indictment against him is amended. *See* TEX. CODE CRIM. PROC. ANN. art. 28.10 (West 2006). Here, the indictment was not amended and article 28.10 is not applicable.

Appellant's counsel was allowed to withdraw on January 25, 2011, based in part upon Appellant's continuing refusal to communicate with him. Our record includes thirty-three motions and objections and two original proceedings filed in the trial court by Appellant, acting independently of his counsel, between August 20, 2010, and January 26, 2011. Among those motions is a motion for discovery of all records of the guilt/innocence phase of his trial, including the victim's bank records, and three motions involving Appellant's felony convictions in cause numbers 18,349 and 19,061. Appointed counsel stated on the record that he had provided Appellant with the clerk's record and reporter's record of the guilt/innocence phase. Appellant wanted the victim's bank records to prove that he was not guilty of the theft, an issue that had already been laid to rest. Appellant apparently failed to realize that he was not retrying the guilt/innocence portion of the case. Nevertheless, the motions, objections, and original proceedings were in preparation for the upcoming hearing. Thus, Appellant had several months to prepare for the resentencing hearing. Moreover, the record shows that Appellant was aware of the

October 26, 2010 setting that had been continued. Also, Appellant admitted that his sister had told him that his trial would be January 24 or January 25. Finally, this court's December 15, 2010 opinion disposing of Appellant's petition for writ of mandamus in which he requested this court to direct the trial court to conduct a sentencing hearing included a reference to the January 25, 2011 date for the sentencing hearing. Therefore, the record does not support a conclusion that Appellant did not have sufficient time to prepare for trial.

Notice of Enhancements

A defendant is entitled to notice of the State's intention to use prior convictions for enhancement. *See* ***Brooks v. State***, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997). Prior convictions used as enhancements must be pleaded in some form, but they need not be pleaded in the indictment. ***Id***. at 34. Here, the State used Appellant's prior convictions in cause numbers 18,349 and 19,061 to enhance sentencing in the 2008 trial of this cause. On appeal, this court determined that Appellant had sufficient notice prior to trial of the enhancements the State would seek. *See* ***Kennedy***, 2009 Tex. App. LEXIS 9514, at *4. Just after that opinion issued, on January 6, 2010, Appellant filed a motion to quash all prior felony convictions based on his assertion that he had never been convicted in cause numbers 18,349 and 19,061. On January 21, 2011, the State filed its first amended notice of enhancement paragraphs to be submitted at punishment, pleading its intent to again use Appellant's prior convictions in cause numbers 18,349 and 19,061 to enhance sentencing. At the resentencing hearing, the State presented proof that, at the first trial, Appellant took the stand and admitted to having been convicted in cause numbers 18,349 and 19,061. Thus, Appellant had sufficient notice of the State's intention to use those convictions to enhance sentencing.

Witnesses for the Defense

In his January 25, 2011 motion for continuance, Appellant argued that he needed time to call witnesses for his defense. A defendant has the right to have compulsory process for obtaining witnesses in his favor. *See* ***Coleman v. State***, 966 S.W.2d 525, 526 n.2 (Tex. Crim. App. 1998) (op. on reh'g). Appellant explained to the trial court that he filed motions requesting subpoenas for over a dozen witnesses. The record includes only four subpoena requests for witnesses, filed January 26, 2011. Based on Appellant's explanation to the trial court, it is clear he wanted the testimony of many of the witnesses because he thought they would indicate that he was not guilty of the theft, a question no longer before the trial court. He wanted the justices of this court to appear

as witnesses in the trial court because, he claimed, he needed to know why his conviction was affirmed, and the justices could confirm that he had filed certain motions. The trial court determined that Appellant had not complied with the requirements of code of criminal procedure article 24.12 and therefore those witnesses would not be subpoenaed. Because Appellant did not follow the correct procedure in procuring subpoenas, he was not entitled to have an attachment issue for the witnesses. *See* TEX. CODE CRIM. PROC. ANN. art. 24.12 (West 2009).

Additionally, Appellant is not guaranteed the right to secure the attendance and testimony of any and all witnesses; rather, he may obtain witnesses whose testimony would be both material and favorable to the defense. ***Coleman***, 966 S.W.2d at 527-28. Appellant must make a plausible showing to the trial court, by sworn evidence or agreed facts, that the witness's testimony would be both material and favorable to the defense. ***Id***. at 528. Here, the expected testimony of the requested witnesses was not material to the issue of sentencing. Therefore, Appellant has not shown the right to compulsory attendance of the named witnesses or to a continuance to secure their presence. We note further that Appellant's motion for continuance is not sworn to as required by the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. § 29.08 (West 2006). A motion for continuance is a matter left to the sound discretion of the trial court. ***Smith v. State***, 721 S.W.2d 844, 850 (Tex. Crim. App. 1986). For the foregoing reasons, we conclude that the trial court did not abuse its discretion in denying Appellant's motion for continuance.

Witness Chris Dobbs

In the trial court, Appellant did not object to Chris Dobbs's taking the stand on the basis of inadequate notice. Therefore, Appellant has waived this complaint. *See* TEX. R. APP. P. 33.1. We note that the State's witness list is not included in the record on appeal. Further, Dobbs was not called to testify as to anything he knew about the case. He was called merely to read the victim's prior testimony, which Appellant previously had access to. As explained below, reading the prior testimony into the record is permissible.

We overrule Appellant's original brief issues one, two, eighteen, and twenty, and issue seven to the extent Appellant complains of the denial of his motion for continuance. We also overrule Appellant's first and fifth issues in his supplemental brief.

NOTICE OF CHARGE

In his fifth issue in his original brief and his fourth issue in his supplemental brief, Appellant

contends the State failed to prove notice of the charge against him, substantially prejudicing his rights. He claims he did not receive a copy of the indictment. In his fourteenth issue, Appellant asserts a violation of Texas Constitution article one, section ten because he was not provided a copy of the indictment, causing him to be unable to prepare a defense, and thereby denying him a fair trial.

Article one, section ten of the Texas Constitution provides that a defendant shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. TEX. CONST. art. I, § 10. An indictment provides a defendant notice of the offense charged so that he may prepare, in advance of trial, an informed and effective defense. *See* ***Garcia v. State***, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998). Appellant received a copy of the indictment before the 2008 guilt/innocence phase of the trial. On appeal, this court affirmed Appellant's guilt and reversed solely for a new sentencing hearing. ***Kennedy***, 2009 Tex. App. LEXIS 9514, at *10. When a case is remanded for a new hearing on punishment only, the trial court proceeds directly to the punishment stage of the trial. TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (West Supp. 2011). At this point in the proceedings, there is no logical reason to require the State to provide a defendant with another copy of the indictment. However, at the beginning of proceedings on January 25, the trial court granted Appellant's request for a copy of the indictment. To the extent Appellant is complaining that he needed additional time after January 25 to prepare for trial, we have addressed that complaint above. We overrule Appellant's fifth and fourteenth issues in his original brief and his fourth issue in his supplemental brief.

TESTIMONY FROM GUILT/INNOCENCE PHASE

In his third issue in his original brief, Appellant contends the trial court erred by taking judicial notice of, and allowing the State to present testimony from, the guilt/innocence phase by reading it to the jury. He asserts the proper method of presenting the testimony was admission into evidence of the reporter's record of that hearing. He argues that the testimony was false and caused confusion and that the jury had no way to determine if the State's witnesses were truthful. In his fourth issue in his original brief, Appellant asserts the State failed to prove that the victim, Forrest Bradberry, was elderly. In his eighth issue, Appellant asserts the State failed to prove that Bradberry filed a criminal complaint against him for theft. In his seventh issue, Appellant contends, in part, that Chris Dobbs's testimony was hearsay. In his ninth issue, Appellant contends

the State presented false testimony when Chris Dobbs testified that Bradberry cashed the insurance checks. He argues that testimony was false because the custodian of the bank's records testified that the checks were deposited, not cashed. In his nineteenth issue, Appellant asserts that the court reporter altered the records to state that Bradberry cashed the insurance checks and paid Appellant. He argues that Bradberry did not testify that he cashed the insurance checks and the trial court knew the records were altered. In his sixth issue in his original brief, he contends that, by using Bradberry's prior testimony, he was denied his constitutional right to cross-examine Bradberry.

The victim in this case, Forrest Bradberry, testified under oath at Appellant's 2008 trial and he was cross-examined by Appellant. Bradberry died after the guilt/innocence trial and before the second punishment hearing. Chris Dobbs, an investigator with the district attorney's office, read portions of Bradberry's trial testimony from the witness stand, including a portion of Appellant's cross-examination of Bradberry.

In order for prior testimony to be admissible, it must be shown that the witness's testimony at the former trial was given under oath, it was competent, the accused was present and had adequate opportunity to cross-examine him, and the accused was the defendant at the former trial upon the same charge. ***Raley v. State***, 548 S.W.2d 33, 35 (Tex. Crim. App. 1977). The prior testimony of an unavailable declarant is not excluded as hearsay if the party against whom it is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. *See* TEX. R. EVID. 804(b)(1). An unavailable witness is one who has died since the original proceeding. TEX. R. EVID. 804(a)(4). Bradberry was an unavailable witness whose testimony met all of the above requirements for admissibility at the second sentencing hearing. Dobbs's reading of that testimony was not inadmissible hearsay. The rules of evidence do not specify how the prior testimony is to be presented in the second trial. ***Smith v. State***, 907 S.W.2d 522, 532 (Tex. Crim. App. 1995). Reading the prior testimony into the record is an appropriate method of introducing the prior testimony. *See* ***Martinez v. State***, 327 S.W.3d 727, 737-38 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 2966 (2011); ***Bryan v. State***, 837 S.W.2d 637, 640 (Tex. Crim. App. 1992) (court reporter read portions of defendant's testimony from prior trial, and reporter's record was admitted into evidence for record purposes only).

The remainder of Appellant's complaints under these issues relate to guilt/innocence. The case was remanded solely for a new punishment hearing, and neither the trial court nor this court can revisit the question of guilt. ***Easton v. State***, 920 S.W.2d 747, 750 (Tex. App.–Houston [1st

Dist.] 1996, no pet.). We overrule Appellant's third, fourth, sixth, eighth, ninth, and nineteenth issues in his original brief. We overrule Appellant's seventh issue to the extent of his hearsay complaint.

ENHANCEMENT PARAGRAPHS

In his fifteenth, sixteenth, and seventeenth issues, Appellant contends the State failed to prove he had been convicted in cause numbers 18,349 and 19,061. Accordingly, he argues, the evidence is insufficient to support the enhancement allegations.

To prove a defendant has a prior conviction, the State must establish that the prior conviction exists and that it is linked to the defendant. ***Flowers v. State***, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). No specific mode of proof is required to prove these elements. ***Id***. Evidence of a certified copy of a final judgment and sentence is a preferred and convenient means of proof. ***Id***. However, the State may prove these elements in a number of ways, including the defendant's admission. ***Id***. at 921-22. At the sentencing hearing, the State presented Appellant's testimony, given in the original trial, admitting to having been convicted in cause numbers 18,349 and 19,061. Further, the State placed in evidence the trial court judgment in cause number 19,061, the indictments in each case, and the appellate court mandates in each case, showing that Appellant was convicted in each case and the judgment in each case was affirmed on appeal. This evidence is sufficient to prove that Appellant was convicted in each case and supports the enhancement allegations. *See* ***id***. We overrule Appellant's issues fifteen, sixteen, and seventeen.

ASSISTANCE OF COUNSEL

In his tenth issue in his original brief and his second and sixth issues in his supplemental brief, Appellant asserts the trial court violated his Sixth Amendment right to counsel. He argues that he had filed many motions to dismiss counsel and had filed a complaint against his attorney several months before trial. However, the trial court failed to timely investigate the claim of a possible conflict of interest. He asserts the trial court knew that counsel "was not wanted and Appellant would not communicate with council [sic]."

In his twelfth issue, Appellant asserts that the trial court erred in denying his motion for new trial based on ineffective assistance of counsel. He argues that his Sixth Amendment right was violated because trial counsel did not communicate with him and he had a right to conflict-free

representation. He argues that the trial court should have appointed new counsel. In his thirteenth issue in his original brief and his third issue in his supplemental brief, Appellant contends he was denied effective assistance of counsel because of alleged errors counsel made in representing him in the appeal of the first trial of this cause.

Appellant includes one sentence in his second issue in his supplemental brief complaining that the trial court denied "indigent appointment of counsel on appeal." The statement in the supplemental brief is not supported by argument or authority as required by the rules. *See* TEX. R. APP. P. 38.1(i). Further, Appellant does not provide the record citation showing where he requested this relief from the trial court, and we have been unable to locate it. Moreover, at the conclusion of the trial, Appellant told the trial court that he wanted to appeal and he wanted to represent himself on appeal. Any complaint about the failure to appoint appellate counsel has been waived. *See* TEX. R. APP. P. 33.1(a).

The record shows that, on August 18, 2010, the trial court appointed William House to represent Appellant at the resentencing hearing. Appellant filed numerous motions over a period of six months, apparently acting as his own attorney. Appellant made it clear that he refused to communicate with his attorney. On October 21, 2010, Appellant filed a motion to dismiss counsel and represent himself. In the motion, he stated that "Michael Kennedy will be the Attorney and refuses to communicate or talk or discuss this case with any attorney and requests counsel William M. House, Jr. removed before someone get [sic] hurt due to the conflict [of] interest." House filed a motion to withdraw on January 24, 2011. At the hearing on January 25, 2011, House said he had not received any direct communication from Appellant and had not attempted to communicate with Appellant about resentencing because Appellant did not want to talk to him. After advising against it, the trial court allowed counsel to withdraw and allowed Appellant to represent himself.

Pursuant to the Sixth Amendment, defendants shall have the right to assistance of counsel. U.S. CONST. amend. VI. The right to counsel necessarily includes the right to reasonably effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984). To determine whether counsel was ineffective, Appellant must demonstrate counsel's performance was deficient and not reasonably effective. ***Id***. at 688-92. Second, Appellant must demonstrate the deficient performance prejudiced the defense. ***Id***. at 693. Essentially, Appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability

that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. ***Id***. at 694. Judicial scrutiny of counsel's performance must be highly deferential, and we are to indulge the strong presumption that counsel was effective. ***Jackson v. State***, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). It is Appellant's burden to rebut this presumption, by a preponderance of the evidence. ***Id***. Any allegation of ineffectiveness must be firmly founded in the record. ***Salinas v. State***, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

A trial court's denial of a defendant's motion for new trial based on ineffective assistance of counsel is reviewed under an abuse of discretion standard. ***State v. Gill***, 967 S.W.2d 540, 541 (Tex. App.–Austin 1998, pet. ref'd). We review the trial court's application of the ***Strickland*** test under the abuse of discretion standard. ***Id***. at 542. We determine whether the trial court's decision was clearly wrong as to lie outside the zone of reasonable disagreement. ***Cantu v. State***, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

Here, we find nothing in the record rebutting the presumption that Appellant's trial counsel made all significant decisions in the exercise of reasonable judgment between August 18, 2010, when he was appointed, and January 25, 2011, when he withdrew. Counsel's failure to communicate with Appellant was due to Appellant's refusal to communicate with counsel. Appellant's failure to get along with his attorney does not mean that Appellant was denied effective assistance of counsel. *See* ***Malcom v. State***, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982). At trial, Appellant asked the trial court to allow him to represent himself and that motion was granted. Appellant cannot now complain that the trial court should have appointed new counsel. Appellant received the relief he asked for and has not shown that the trial court violated his Sixth Amendment right to counsel. Additionally, Appellant cannot complain in this appeal about potential errors committed in the previous appeal. The trial court's decision to deny Appellant's motion for new trial on grounds of ineffective assistance of counsel was not so clearly wrong as to lie outside the zone of reasonable disagreement. *See* ***Cantu***, 842 S.W.2d at 682. We overrule Appellant's tenth, twelfth, and thirteenth issues in his original brief and his second, third, and sixth issues in his supplemental brief.

EXCESSIVE SENTENCE

In his twenty-first issue, Appellant contends the sentence imposed was outside the range of punishment and unauthorized by law. He argues that there is no proof that the charge against him

was a third degree felony. He asserts that the charge against him was a state jail felony. He asserts that the indictment was never read to the jury and the State did not prove that the victim was elderly. Finally, Appellant argues that the State failed to prove the enhancement paragraphs.

Appellant was charged with theft of property worth more than $1,500.00 and less than $20,000.00, normally a state jail felony. *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(A) (West Supp. 2012). Additionally, the indictment alleged that the victim was elderly, which elevated the punishment range from that of a state jail felony to that of a third degree felony. *See* TEX. PENAL CODE ANN. § 31.03(f)(3)(A) (West Supp. 2012). Further, the State sought an enhanced sentence based on two prior felony convictions, making the offense punishable by imprisonment for life, or for any term of not more than ninety-nine years or less than twenty-five years, and a fine not to exceed $10,000.00. TEX. PENAL CODE ANN. §§ 12.34(b), 12.42(d) (West 2011 & Supp. 2012).

The State presented Bradberry's trial testimony in which he testified that he paid Appellant "somewhere in the neighborhood of $21,000.00" for very little work done on his house. He also stated that he was eighty-six years old at the time of trial. Additionally, the State introduced Bradberry's birth certificate, showing his birth date as October 21, 1921. As to proof of the enhancements, the State presented Appellant's trial testimony admitting that he had been convicted of the two prior felonies, as well as documentary proof of the convictions. Accordingly, the ninety-nine year sentence of imprisonment and accompanying $10,000.00 fine are within the appropriate range of punishment for the charge against Appellant. *See* ***id***. We overrule Appellant's twenty-first issue.

DISPOSITION

Having overruled all of Appellant's issues, we ***affirm*** the trial court's judgment. Furthermore, all of Appellant's pending motions are ***overruled*** as moot.

SAM GRIFFITH
Justice

Opinion delivered August 8, 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

AUGUST 8, 2012

NO. 12-11-00041-CR

MICHAEL ALLYN KENNEDY,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 3rd Judicial District Court
of Anderson County, Texas. (Tr.Ct.No. 29326)

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.