NO. 12-11-00091-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MARVIN LOUIS THOMPSON, APPELLANT	***§***	***APPEALS FROM THE 173RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Marvin Louis Thompson appeals his conviction for possession of a controlled substance, namely cocaine, with intent to deliver in an amount of four grams or more but less than two hundred grams. On appeal, Appellant presents three issues. We modify and, as modified, affirm.

BACKGROUND

Appellant was charged by indictment with possession of a controlled substance, namely cocaine, with intent to deliver in an amount of four grams or more but less than two hundred grams, a first degree felony.[1] The indictment also included an enhancement paragraph, alleging that Appellant had been convicted of a felony prior to the commission of the charged offense. Appellant pleaded "not guilty." At trial, Jody Miller, an investigator with the Henderson County Sheriff's Department assigned to the Henderson County Drug Enforcement Unit, testified that a confidential informant advised him that a crack cocaine dealer agreed to meet the informant and sell him crack cocaine. Miller stated that the confidential informant described the dealer as a "rather large black man" who would be driving a white Chevrolet pickup. According to Miller, the informant agreed

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2010).

to meet the dealer at a specified vacant church parking lot on a weekday when services were not being held. Miller and three other officers drove to the church and saw a large black man sitting in a white Chevrolet pickup as had been described by the informant. Further, he stated that the parking lot was empty and that the pickup was the only vehicle in the parking lot. Miller testified that the officers approached the vehicle and identified the occupant as Appellant. He stated that he asked Appellant if there was anything illegal in his vehicle. Appellant admitted he had some marijuana in his ashtray. At that point, the officers searched Appellant's pickup and found marijuana in the cup holder, a piece of aluminum foil containing crack cocaine on the console between the seats, and a plastic M&M container located in a "cubby hole" in the dash that also contained crack cocaine. One of the other officers, Damon Boswell, chief of police at the Gun Barrel City Police Department assigned to the Henderson County Drug Enforcement Unit, testified that Appellant had $1,035.00 in cash.

Miller testified that factors he considers in distinguishing a drug user from a drug dealer include the amount of drugs and the amount of cash found on the suspect. He stated that a quarter of a gram of crack cocaine is a usable amount, but that the amount of cocaine found in Appellant's vehicle was a "dealing amount" of drugs. Miller and Boswell also stated that they believed Appellant was in a suspicious place at a suspicious time because he was in a parked vehicle in a vacant church parking lot during midweek. They testified that these circumstances allowed them to approach Appellant to question him. Claybion F. Cloud, a forensic chemist with the Texas Department of Public Safety crime lab, testified that he tested samples submitted by Boswell. One sample contained .53 grams of marijuana, the second sample contained 1.51 grams of crack cocaine, and the sample from the M&M container contained 7.65 grams of crack cocaine.

At the conclusion of the trial, the jury found Appellant guilty of possession of a controlled substance, namely cocaine, with intent to deliver in an amount of four grams or more but less than two hundred grams, as charged in the indictment. The jury then assessed his punishment at forty years of imprisonment and a $2,000.00 fine.[2] This appeal followed.

[2] If it is shown on the trial of a first degree felony that the defendant has previously been convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished by imprisonment for life, or for any term of not more than ninety-nine years or less than fifteen years and, in addition, a fine not to exceed $10,000.00. *See* TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2012).

ADMISSION OF HEARSAY STATEMENTS

In his first issue, Appellant contends that the testimony regarding the confidential informant's hearsay statements were erroneously admitted into evidence. Further, he argues that these statements were not harmless. The State disagrees, arguing that the confidential informant's statements were not erroneously admitted because they were not hearsay, i.e., not offered for the truth of the matter asserted. Even if the statements were erroneously admitted, the State contends, Appellant did not object to similar evidence, did not request a limiting instruction or a running objection, and made only a hearsay objection. Thus, the State argues, any erroneously admitted testimony was harmless.

Applicable Law

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). Hearsay is not admissible except as provided by statute or the rules of evidence or other rules prescribed pursuant to statutory authority. TEX. R. EVID. 802. Erroneously admitting evidence "will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling." ***Coble v. State***, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010) (quoting ***Leday v. State***, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998)). In other words, an error in the admission of evidence is harmless if substantially the same evidence is admitted elsewhere without objection. *See* ***Mayes v. State***, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); ***Prieto v. State***, 337 S.W.3d 918, 922 (Tex. App.—Amarillo 2011, pet. ref'd). Therefore, "defense counsel must object every time allegedly inadmissible evidence is offered." ***Hudson v. State***, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984).

Erroneous admission of hearsay is nonconstitutional error. TEX. R. APP. P. 44.2(b); *see* ***Garcia v. State***, 126 S.W.3d 921, 927-28 (Tex. Crim. App. 2004). We must disregard all nonconstitutional errors that do not affect the appellant's substantial rights. TEX. R. APP. P. 44.2(b); ***Russell v. State***, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005); ***Morales v. State***, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). A "substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." ***Morales***, 32 S.W.3d at 867 (quoting ***King v. State***, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). Substantial rights are not affected by the erroneous admission of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had

but a slight effect." ***Motilla v. State***, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting ***Solomon v. State***, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001)).

In determining the likelihood that a jury's decision was adversely affected by the error, an appellate court should consider "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." ***Morales***, 32 S.W.3d at 867. The reviewing court might also consider the jury instructions, the State's theory and any defensive theories, closing arguments, and voir dire, if material to an appellant's claim. ***Motilla***, 78 S.W.3d at 355-56 (citing ***Morales***, 32 S.W.3d at 867).

As a predicate to presenting a complaint on appeal that evidence was admitted in error, the complaining party must have preserved the error at trial by a proper request, objection, or motion stating the grounds for the ruling that the party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, and securing a ruling on the request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1)(A), (2); ***Ethington v. State***, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). This request, objection, or motion must be timely; that is, the complaining party must have objected to the evidence, if possible, before it was actually admitted. *See* ***Ethington***, 819 S.W.2d at 858. If not, an objection should be made to the evidence as soon as the ground for objection becomes apparent. ***Lagrone v. State***, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). If a complaining party fails to object until after an objectionable question has been asked and answered, and the party can show no legitimate reason to justify the delay, the party's objection is untimely and any complaint about the admission of the evidence is waived. ***Id.***

Analysis

At trial, Appellant's theory of the case, i.e., his motivating theme, is that Miller and Boswell committed aggravated perjury because they intentionally withheld the name of the confidential informant, a material fact, on the probable cause affidavit that was submitted to the magistrate. As a result, Appellant argues, the officers were not credible and their testimony regarding other facts was unreliable. For Appellant to establish the omission of the confidential informant's name from the probable cause affidavit, it was necessary for Appellant to either adduce testimony establishing the existence of the confidential informant and that he provided information regarding Appellant or permit the State to develop the testimony. However, Appellant was "gored" by this dilemma

because an error in the admission of evidence is harmless if substantially the same evidence is admitted elsewhere without objection. *See* ***Mayes***, 816 S.W.2d at 88; ***Prieto***, 337 S.W.3d at 922. Further, Appellant must object every time allegedly inadmissible evidence is offered or his objection is untimely and any complaint about the admission of the evidence is waived. *See* ***Lagrone***, 942 S.W.2d at 618; ***Hudson***, 675 S.W.2d at 511. From our review of the record, we conclude that Appellant failed to do so.

During the State's opening statement, the prosecutor stated that the jury would "hear information that the person that was providing the officers with this information about the Defendant, was actually going to be buying this [cocaine] from this Defendant." Appellant did not object. Approximately midway through Jody Miller's testimony, he began to testify regarding the confidential informant, Troy Smith, including how long he had been an informant and his reliability. When Miller attempted to tell the jury what the confidential informant had told him, Appellant objected as to hearsay. After the State offered to rephrase the question and the trial court overruled the objection, Miller continued to testify, without objection, as follows:

> A: I received a call from Troy Smith. Troy Smith advised [me] there was a subject in Chandler that was a crack dealer, crack cocaine dealer, and that he could purchase a quantity of crack cocaine from the crack dealer, and so arrangements was [sic] made, he made the phone call.
>
> Q: He who?
>
> A: Troy Smith had made the phone call to the person in Chandler, and the person had agreed to meet him and deliver a quantity of crack cocaine.
>
> Q: So this person talked to Troy Smith on the phone and agreed to meet him to sell him crack cocaine?
>
> A: Yes.
>
> . . . .
>
> Q: And you said that Troy Smith had made arrangements with this person to meet him somewhere to buy this crack cocaine?
>
> A: Yes.
>
> Q: Where was this - - where was this location?
>
> A: He was going to meet him in Brownsboro, Texas.
>
> Q: Did you have a specific place that he had told you?
>
> A: At the time I can't recall the specific place, but I know where it ended up being, because it kind of changed as - - I was in contact with Troy Smith, who was in contact with the

person, and it was kind of changing. He was on his way, he's going here, he's going there, type deal.

Q: But he told you it was going to be in Brownsboro; is that correct?

A: Told me it was going to be in Brownsboro.

. . . .

Q: Did he tell you the person was at the church, or did he give you - -

At that point, Appellant again objected as to hearsay. The State countered that the testimony was not being offered "for the truth of the matter asserted, but to show the officers' mindset in believing this was a suspicious place and suspicious circumstances that they encountered" when they discovered Appellant in the vacant church parking lot. The trial court overruled Appellant's objection. Less than a page later in the record, Miller testified, without objection, that "[a]s the phone calls progressed, and we knew that the subject was on the way," he requested that the informant not allow Appellant to go to his house, but meet him somewhere else. Then, Miller testified that he "received another call [from the informant] that said that [Appellant] was at the Union Hill Church there on 3204 in the white pickup." Miller stated that he arrived at the church around five o'clock in the afternoon, and a white pickup was in the empty parking lot. The State continued to question Miller, without objection, as follows:

Q: Which corroborated what Troy Smith had told you?

A: Yes.

Q: Based on the middle of the week, church not being in session, no one else in the parking lot but one vehicle, and the information you had gotten from Troy Smith, anything suspicious to you about that particular - - what you saw when you got to the church?

A: It substantiated all the information that was received prior to getting to the church.

The next witness, Damon Boswell, testified, without objection, that "Investigator Miller had an informant who had told him a subject that was there in, I believe, a white pickup truck in possession of narcotics." In cross examining Boswell, Appellant's attorney asked, "[A]nd it's fair to say that in this case the most important basis of your probable cause was the information that was provided by Troy Smith? I mean, he told you to go to a specific location and look for a specific guy?" Boswell replied, "Yes, sir."

In his closing argument, Appellant's attorney addressed the jury regarding the confidential informant, the probable cause affidavit, and the credibility of the officers. He stated that Appellant was sitting in the pickup truck, but "we don't know why he was there for sure, unless you believe that [the informant], who appeared late in the innings was telling the truth." Again, referring to the confidential informant, Appellant's attorney stated that it was "difficult to tell whether the stuff about [the confidential informant] is true. It's difficult to tell if the stuff did happen, if [Appellant] had any intent to deliver." In its final closing, the State asserted, without objection, that "[t]he police officers had a lawful right to approach [Appellant] in that parking lot based on what they heard from [the confidential informant.]" Later, the State said, without objection, that the confidential informant told "the officers the [Appellant] agreed to meet him at the Baptist church parking lot to sell him cocaine."

It is clear from the record that Appellant allowed an abundance of testimony regarding the confidential informant and his statements about Appellant's agreeing to sell him crack cocaine in the church parking lot into evidence without timely objections. *See* ***Ethington***, 819 S.W.2d at 858. Because the evidence admitted without objection was substantially the same as the officers' statements regarding the confidential informant objected to by Appellant, any error in admitting the confidential informant's hearsay statements is harmless. *See* ***Mayes***, 816 S.W.2d at 88; ***Prieto***, 337 S.W.3d at 922.

Even if Appellant had objected each time the alleged inadmissible evidence was offered, any error in admitting the evidence would be nonconstitutional error. *See* TEX. R. APP. P. 44.2(b); *see* ***Garcia***, 126 S.W.3d at 927-28. In considering the whole record, we note that the State did not emphasize the confidential informant's statements in closing arguments except to discuss the officers' credibility. Additionally, the evidence supporting the verdict included the amount of cocaine found in the pickup and Appellant's admission that he had other contraband in the pickup. Therefore, we have a fair assurance that any error in admitting the statements complained of on appeal did not influence the jury, or had but a slight effect. *See* ***Motilla***, 78 S.W.3d at 355.

Appellant's first issue is overruled.

EVIDENTIARY SUFFICIENCY

In his second issue, Appellant argues that the evidence is legally insufficient to support his conviction for possession of a controlled substance, namely cocaine, with intent to deliver in an

amount of four grams or more but less than two hundred grams.

Standard of Review

The ***Jackson v. Virginia***[3] standard is the "only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *See* ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under ***Jackson***, when reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 318-19, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899. Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See* ***Brooks***, 323 S.W.3d at 899; ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, a reviewing court defers to the fact finder's resolution of conflicting evidence unless that resolution is not rational in light of the burden of proof. *See* ***Brooks***, 323 S.W.3d at 899-900. The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." ***Id.***

Applicable Law

A person commits an offense if he "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1," namely cocaine, in an amount of four grams or more but less than two hundred grams. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D) (West 2010); 481.112(a), (d) (West 2010). Intent to deliver may be proved by circumstantial evidence, including evidence surrounding its possession. ***Rhodes v. State***, 913 S.W.2d 242, 251 (Tex. App.–Fort Worth 1995), *aff'd*, 945 S.W.2d 115 (Tex. Crim. App. 1997). The intent can be inferred from the acts, words, and conduct of the accused. ***Patrick v. State***, 906

[3] 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

S.W.2d 481, 487 (Tex. Crim. App. 1995). Among the factors to be considered in determining whether a defendant possessed the contraband with an intent to deliver include the nature of the location where the defendant was arrested, the quantity of drugs the defendant possessed, the manner of packaging the drugs, the presence or absence of drug paraphernalia, whether the defendant possessed a large amount of cash, and the defendant's status as a drug user. ***Kibble v. State***, 340 S.W.3d 14, 18-19 (Tex. App.–Houston [1st Dist] 2010, pet. ref'd); *see also* ***Williams v. State***, 902 S.W.2d 505, 507 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). This list of factors is not exclusive, nor are they all required to be present in order to establish a defendant's intent to deliver. ***Kibble***, 340 S.W.3d at 19.

Analysis

At trial, Miller, an investigator with the Henderson County Sheriff's Department, testified that he and three other officers drove to a location where he was told by a confidential informant that a crack cocaine dealer agreed to sell him cocaine. At the location, a vacant church parking lot, Miller saw a large black man sitting in a white Chevrolet pickup. Miller and Boswell, chief of police at the Gun Barrel City Police Department, testified that they believed Appellant was in a suspicious place at a suspicious time because he was in a parked vehicle in a vacant church parking lot during midweek. The officers testified that these circumstances allowed them to approach Appellant to question him. When the officers approached the vehicle and identified Appellant, Miller asked Appellant if he had anything illegal in his vehicle. Appellant conceded that he had some marijuana in his ashtray. At that point, the officers searched Appellant's pickup and discovered .53 grams of marijuana in his cup holder, 1.51 grams of crack cocaine in a piece of aluminum foil, and 7.65 grams of crack cocaine in a plastic M&M container in the dash. Miller stated that a quarter of a gram of crack cocaine is a usable amount, but that the amount of cocaine found in Appellant's vehicle was a "dealing amount" of drugs. Boswell also testified that Appellant had $1,035.00 in cash. However, he admitted that Appellant told him that the cash was from Appellant's employment as a truck driver.

In ***Branch v. State***, the court held that where the evidence showed the defendant possessed more drugs than a "usable" amount, that the drugs were secreted in various places in the defendant's vehicle at the time of his arrest, and that he possessed a large sum of money, "the only reasonable explanation for these facts [was that the defendant] was actively engaged in the business of selling" drugs. *See* ***Branch v. State***, 599 S.W.2d 324, 325-26 (Tex. Crim. App. 1979). Here,

Appellant's intent to deliver may be inferred from the quantity of drugs possessed, over eight grams of crack cocaine. This amount of contraband was identified by Miller as a "dealing amount." According to Miller, a usable amount of crack cocaine would be a quarter of a gram. Further, the contraband was concealed in a cup holder, on the console between the seats, and in a "cubby hole" in the dash of Appellant's pickup. Appellant's intent to deliver could have also been inferred from the location where he was arrested, a vacant church parking lot on a weekday when services were not being held. Miller also stated that Appellant, his vehicle, and his location matched the description given to him by the confidential informant. Although Appellant did not possess any drug paraphernalia and he informed Boswell that the money was from his employment as a truck driver, the jury could have inferred Appellant's intent to deliver from the amount of money he possessed.

Having examined the evidence in the light most favorable to the verdict, we conclude that the jury could have determined beyond a reasonable doubt that Appellant possessed a controlled substance, namely cocaine, with intent to deliver in an amount of four grams or more but less than two hundred grams. *See* ***Branch***, 599 S.W.2d at 325-26; ***Kibble***, 340 S.W.3d at 19. Therefore, we hold that the evidence is legally sufficient to support the trial court's judgment.

Appellant's second issue is overruled.

ENHANCEMENT PARAGRAPH

In his third issue, Appellant argues that the jury failed to render a unanimous verdict regarding the enhancement paragraph allegation. Because the jury did not make a finding on the enhancement paragraph allegation, he contends the judgment must be reversed and remanded for a new punishment hearing. At trial, Appellant pleaded "true" to the enhancement paragraph. Appellant's attorney had no objection to the portion of the jury charge on punishment related to the enhancement allegation that stated as follows:

> The Enhancement Paragraph of the indictment alleges that, prior to the commission of the offense in this case, the Defendant was finally convicted of the felony offense of Possession of a Controlled Substance. To this allegation in the Enhancement Paragraph of the indictment the Defendant has pleaded "True."

The range of punishment listed in the jury charge was the appropriate sentence for a first degree felony with one previous felony conviction, i.e., imprisonment for life, or for any term of

not more than ninety-nine years or less than fifteen years and, in addition, a fine not to exceed $10,000.00. *See* TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2012).

The jury verdict form stated as follows:

> We, the jury, having found the Defendant, Marvin Louis Thompson, guilty of the first degree offense of Possession of a Controlled Substance [with intent to deliver,] assess his punishment at _____ (15 years up to 99 years or Life) in the Texas Department of Criminal Justice, Institutional Division and, in addition, assess a fine of $ _____($0 - $ 10,000).

After the punishment hearing, the jury inserted its verdict of forty years of imprisonment and a $2,000.00 fine in the blank spaces on the jury form. However, the trial court's recitation of the jury's verdict on punishment in the judgment of conviction stated that the jury "[did] further find the allegation in the one enhancement paragraph True."

Where the State alleges a prior conviction for enhancement of punishment purposes, it has the burden to prove that the prior conviction was a final conviction under the law. ***Harvey v. State***, 611 S.W.2d 108, 111 (Tex. Crim. App. 1981) (op. on reh'g). When a defendant pleads true to an enhancement paragraph, however, the validity of the enhancement allegation is not an issue and removes this burden from the state. ***Id.***; ***Howell v. State***, 563 S.W.2d 933, 936 (Tex. Crim. App. 1978). Therefore, there is no need to submit its validity for jury consideration because the verdict, when read in connection with the indictment and the court's charge, is responsive. ***Howell***, 563 S.W.2d at 936. Error, if any, is waived by defendant's failure to object to the charge. ***Id.***

Here, Appellant pleaded "true" to the enhancement paragraph, and his attorney did not object to the jury charge even though it omitted asking the jury whether the enhancement paragraph was true. Further, the jury's charge on punishment stated that Appellant pleaded "true" to the enhancement paragraph, and the jury charge recited the appropriate range of punishment. Because the validity of the enhancement allegation was not in issue, there was no need for the trial court to submit the undisputed issue to the jury. *See* ***Howell***, 563 S.W.2d at 936; ***Harvey***, 611 S.W.2d at 111. Moreover, any error was waived by Appellant's attorney's failure to object the jury's charge on punishment. *See* ***Howell***, 563 S.W.2d at 936. Accordingly, Appellant's third issue is overruled.

CONCLUSION

We have overruled Appellant's first, second, and third issues. Nonetheless, the judgment of

conviction erroneously states that the jury made an affirmative finding of "true" to the enhancement paragraph. An appellate court has the power to correct and reform a trial court judgment to make the record "speak the truth" when it has the necessary data and information before it to do so. ***Cobb v. State***, 95 S.W.3d 664, 668 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The judgment of conviction recites the jury's verdict on punishment as "[w]e, the jury, having found the defendant, Marvin Louis Thompson, guilty of the felony offense of Possession of Controlled Substance with Intent to Deliver, namely Cocaine, in an amount of four grams or more, but less than 200 grams, do further find the allegation in the one enhancement paragraph True and assess his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for 40 Years and assess a $2,000.00 Fine." We ***modify*** the judgment by deleting the phrase "do further find the allegation in the one enhancement paragraph True," and ***affirm*** the trial court's judgment as ***modified***.

SAM GRIFFITH
Justice

Opinion delivered July 31, 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

JULY 31, 2012

NO. 12-11-00091-CR

MARVIN LOUIS THOMPSON,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 173rd Judicial District Court
of Henderson County, Texas. (Tr.Ct.No. C-16,439)

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 the judgment of the trial court below should be modified and as modified, affirmed.

It is therefore ORDERED, ADJUDGED and DECREED by this court that the Judgment of Conviction dated September 17, 2010, **be modified** by deleting the phrase "do further find the allegation in the one enhancement paragraph True," within the recitation of the jury's verdict on punishment, and as **modified**, the judgment of the trial court is **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.