NO. 12-11-00241-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

BLAYNE LAMONT SMITH, APPELLANT	***§***	***APPEAL FROM THE 349TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Blayne Lamont Smith appeals his convictions for aggravated robbery, unauthorized use of a motor vehicle, and criminal mischief. In three issues, Appellant argues the evidence is insufficient to support his conviction for aggravated robbery, the State's enhancement provided insufficient notice, and the jury charge failed to require the proper habitual offender findings. We affirm.

BACKGROUND

Appellant was indicted by a Houston County grand jury for the offenses of aggravated robbery, unauthorized use of a motor vehicle, and criminal mischief. Appellant pleaded guilty to unauthorized use of a motor vehicle and criminal mischief, and a jury found Appellant guilty of aggravated robbery. The State sought to enhance Appellant's sentence as an habitual offender and alleged several prior convictions in its indictment. Appellant pleaded true to the enhancement paragraphs during the punishment phase of the trial. The jury assessed punishment at imprisonment for life for the offense of aggravated robbery and twenty years of imprisonment for each of Appellant's remaining offenses—unauthorized use of a motor vehicle and criminal mischief. The trial court ordered the sentences to run concurrently.

SUFFICIENCY OF THE EVIDENCE

In his first two issues, Appellant challenges the sufficiency of the evidence to support his conviction for aggravated robbery. In his first issue, he argues the evidence is insufficient to show that he "knocked" the victim to the ground during the course of the crime. In his second issue, Appellant contends the evidence is insufficient to prove that he possessed the requisite intent to inflict bodily injury.

Standard of Review

Under the single sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *see also* ***Brooks v. State***, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Juries may not come to conclusions based on mere speculation or factually unsupported presumptions or inferences. *See* ***id.*** at 15. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. ***Id.*** at 16. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. ***Id.*** Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. ***Id.*** A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. ***Id.***

The sufficiency of the evidence is measured by the offense as defined by a hypothetically correct jury charge. ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge 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 appellant was tried. ***Id.***

As charged in the indictment, the State was required to show that Appellant, while in the course of committing theft of property and with intent to obtain or maintain control of the property,

intentionally, knowingly, or recklessly caused bodily injury to Glenna Medina, a person sixty-five years of age or older, by knocking her to the ground. *See* TEX. PENAL CODE ANN. § 29.03(a)(3)(A) (West 2011).

Issue One

Appellant maintains that he never shoved, pushed, or made physical contact with the victim, Glenna Medina. He contends that his conduct was never "violent" or "assaultive," and that he was guilty only of theft from a person.[1] Appellant argues further that because he only "snatched" the victim's purse, the evidence is insufficient to show that he "knocked" the victim to the ground as alleged in the indictment. We disagree.

The victim testified that she was holding her purse while walking to nearby stores in downtown Crockett when Appellant came running from behind her and "pulled" the purse out of her hands, causing her to "fall." Another witness testified that she saw a black man running past the windows where she worked and then heard a "loud thud" outside and a woman say, "[O]h God." The witness testified that as she walked outside, she saw Medina on her knees, trying to stand up, with her arm bleeding. This evidence is sufficient to show that Appellant pulled on Medina's purse with sufficient force to cause her to fall to the ground, which constitutes "knocking [her] to the ground" for purposes of the conviction. *See* ***Turk v. State***, 867 S.W.2d 883, 886 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (holding that pushing an eighty-one year old woman backwards with sufficient force for her to fall to the ground constituted "knocking her to the floor"). We overrule Appellant's first issue.

Issue Two

Appellant next contends that the evidence is insufficient to show that he possessed the requisite mental state to cause bodily injury to Medina.[2] The establishment of culpable mental states is almost invariably grounded upon inferences to be drawn by the fact finder from the attendant circumstances. ***Lane v. State***, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989). The statute and the indictment provided three possible mental states for robbery by bodily injury—intentionally, knowingly, or recklessly. *See* TEX. PENAL CODE ANN. § 29.02(a)(1). A

[1] Appellant argues in his brief that aggravated robbery is a crime of assault, but this is only partially correct. The penal code provides that a robbery will be "aggravated" if, for example, the perpetrator causes serious bodily injury to another, uses or exhibits a deadly weapon, or causes bodily injury to a disabled person or someone over the age of sixty-five. *See* TEX. PENAL CODE ANN. § 29.03(a) (West 2011).

[2] During his videotaped interview, Appellant told the investigating officer that he did not "intentionally" hurt Medina.

person acts intentionally "when it is his conscious objective or desire to engage in the conduct or cause the result." ***Id.*** § 6.03(a). A person acts knowingly "when he is aware that his conduct is reasonably certain to cause the result." ***Id.*** § 6.03(b). A person acts recklessly "when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." ***Id.*** § 6.03(c).

"Bodily injury" is defined as "physical pain, illness, or any impairment of physical condition." ***Id.*** § 1.07(a)(8); ***Lane***, 763 S.W.2d at 786. "Physical pain," "illness," and "impairment of physical condition" are all terms of common usage, and when construed according to the fair meaning of their terms in the context of Section 1.07(a)(8), they are not so vague that persons of common intelligence must necessarily guess at their meaning and differ as to their application. *See* ***id.*** at 787. "Bodily injury" encompasses "even relatively minor physical contacts so long as they constitute more than mere offensive touching." ***Id.*** at 786. Proof of bodily injury does not depend on the severity of the violence used, so long as some resulting "physical pain," "illness," or "impairment of physical condition" can be identified. ***Id.*** at 787.

The evidence at trial showed that during the robbery, Appellant pulled on Medina's purse with sufficient force to knock her down. Medina testified that as a result of being knocked down, she suffered abrasions on her arm and that her knee "began to bother [her]" after the incident. Medina testified that the bruising on her arm hurt for a few days and that her knee has hurt "ever since." The jury reasonably could have found that the injuries Medina suffered are the types of injuries that a person who is knocked down could be expected to suffer. Furthermore, the jury reasonably could have inferred that Appellant was aware that his conduct (pulling on Medina's purse with sufficient force to knock her down) was reasonably certain to cause Medina bodily injury. Therefore, the evidence is sufficient to show that Appellant acted knowingly. *See* TEX. PENAL CODE ANN. § 6.03(b). Accordingly, we overrule Appellant's second issue.

NOTICE OF INTENT TO ENHANCE

As part of his third issue, Appellant argues that the State's enhancement allegations in the indictment failed to provide sufficient notice of its intention to enhance his punishment as an habitual offender because the language in the enhancement paragraphs "gave notice [that the State]

was seeking one enhancement."

A defendant is entitled to notice of prior convictions to be used for enhancement purposes. But it is well settled that it is not necessary to allege prior convictions for the purpose of enhancement with the same particularity that must be used in charging on the primary offense. *See* ***Brooks v. State***, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997); ***Williams v. State***, 980 S.W.2d 222, 226 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd); ***Fitzgerald v. State***, 722 S.W.2d 817, 822 (Tex. App.—Tyler 1987), *aff'd on other grounds*, 782 S.W.2d 876 (Tex. Crim. App. 1990). A description of the judgments of former convictions used to enhance will provide a defendant with the information necessary to find the record and prepare for a trial on the question of whether he is the same individual named in the former conviction. *See* ***Villescas v. State***, 189 S.W.3d 290, 293 (Tex. Crim. App. 2006). The applicable statutes also place an accused on notice that he is subject to having his sentence enhanced to that of an habitual offender. *See* ***Pelache v. State***, 324 S.W.3d 568, 578 (Tex. Crim. App. 2010).

Discussion

Here, at the top of the indictment are listed the offenses alleged in all three counts of the indictment. Below this, the State listed the degree of each count. For Count I, the State listed, "1st degree Felony enhanced to Habitual Offender." For Counts II and III, the State listed, "SJF enhanced to 2nd Degree Felony." Below the three counts in the indictment is a line entitled "Enhancement," which is followed by seven separate paragraphs. Each enhancement paragraph contains the date, cause number, court, county, and offense name for each prior conviction. Additionally, during voir dire, the following comment by the prosecutor provides further notice of the State's intention to seek an enhanced punishment:

> [T]he range of punishment [for aggravated robbery] is 25 to 99 or life . . . and for the other two offenses[, unauthorized use of a motor vehicle and criminal mischief,] it's two to twenty. . . . If [you] cannot consider sending someone to TDC for life for aggravated robbery, if that's how you feel, I need to know now.

Moreover, the enhancements sought were authorized by statute. *See* TEX. PENAL CODE ANN. § 12.42(d), § 12.425(b).[3] Defense counsel made no objections regarding the punishment range

[3] Appellant's punishment was enhanced under a former version of the enhancement statute. However, the difference between the former law and current law does not affect our disposition of the issues in this case. Therefore, we will refer to the current statutes. *See* TEX. PENAL CODE ANN. § 12.42(d), § 12.425(b).

during voir dire and acknowledged the "habitual offender" notation on the face of the indictment in the charge conference during the punishment phase of trial. Appellant never requested a continuance to investigate the veracity of the prior convictions the State listed, nor did Appellant plead "not true" to the State's enhancement paragraphs.

We conclude that Appellant received sufficient notice of the State's intention to enhance his punishment pursuant to Sections 12.42 and 12.425 of the Texas Penal Code. We overrule this portion of Appellant's third issue.

JURY CHARGE

Also, as part of his third issue, Appellant argues that the trial court erred in submitting the punishment charge to the jury without requiring the State to prove the proper sequencing and finality as required by Sections 12.42(d) and 12.425(b) of the Texas Penal Code.

Burden and Required Proof

The penal code provides that a defendant's punishment may be enhanced if certain circumstances exist.

> [I]f it is shown on the trial of a felony offense other than a state jail felony . . . that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. . . .

TEX. PENAL CODE ANN. § 12.42(d).

> If it is shown on the trial of a state jail felony . . . that the defendant has previously been finally convicted of two felonies other than a state jail felony . . . and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a felony of the second degree.

Id. § 12.425(b). Thus, the chronological sequence of events to be proved is as follows: (1) the first conviction became final, (2) the offense leading to a later conviction was committed, (3) the later conviction became final, and (4) the offense for which defendant presently stands accused was

committed. ***Jordan v. State***, 256 S.W.3d 286, 290-91 (Tex. Crim. App. 2008).[4] The state must prove beyond a reasonable doubt that a defendant's second previous felony conviction was committed after the defendant's first previous felony conviction became final. ***Id***. at 291. If there is no evidence that the offenses were committed and became final in the proper sequence, then the defendant's sentence may not be enhanced under the habitual offender statute. ***Id***.

A conviction is presumed to be final if the record of the conviction and the evidence generally do not show that there was an appeal from the conviction. *See* ***Fletcher v. State***, 214 S.W.3d 5, 8 (Tex. Crim. App. 2007). Where there is a final conviction, the offense should be presumed to have been committed sometime within the period of limitation prior to the filing of the indictment. ***Ex parte Salas***, 724 S.W.2d 67, 68 (Tex. Crim. App. 1987).

Finality and Sequencing

Here, the State listed seven enhancement paragraphs in the indictment, each containing the same introductory language, "and it is further presented in and to said Court that, prior to the commission of the aforesaid offenses (hereafter styled the primary offenses). . . ." The enhancements did not contain any language that the prior convictions occurred subsequent to other convictions becoming final, but they were listed in chronological order. When read together, the enhancement paragraphs alleged that Appellant was convicted of four separate third degree felonies on December 18, 1989, two separate third degree felonies on May 6, 1992, and one second degree felony on July 8, 1997. For purposes of efficiency, we will discuss only the proper sequencing of the two alleged prior convictions that authorized enhanced punishment as an habitual offender.

Appellant was convicted in cause number 17,472 in Ellis County, Texas, on December 18, 1989, for committing a third degree felony offense on October 19, 1989. The judgment of conviction contains the notation, "Notice of Appeal: Waived Appeal." Appellant was then convicted in cause number 18,708 in Ellis County, Texas, on May 6, 1992, for committing a third degree felony on August 20, 1991. The judgment of conviction for cause number 18,708 contains the notation, "Notice of Appeal: Waived." The judgments in both cause numbers reflect that the convictions were the result of guilty pleas, and nothing on the face of the documents pertaining to these convictions indicates that there was an appeal in either case.

The judgments in both cause numbers provide prima facie evidence that Appellant

[4] When a defendant pleads "not true" to the enhancement paragraphs, the proper standard of review is sufficiency of the evidence. ***Jordan***, 256 S.W.3d at 291-93. Here, Appellant framed his issue as one of charge error and does not challenge the sufficiency of the State's proof.

committed at least two separate felony offenses in sequence prior to the commission of the offenses in which he was standing trial. Thus, the evidence supports an enhanced punishment range pursuant to Sections 12.42(d) and 12.425(b) of the Texas Penal Code.

The Charge

A court's charge to the jury must correctly apply the law to the facts of the case. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2011). A charge that fails to set out the details and sequencing of the prior convictions in the application paragraph of the charge seeking to enhance punishment under the habitual offender statute is improper. *See* ***Rice v. State***, 746 S.W.2d 356, 360 (Tex. App.—Fort Worth 1988, pet. ref'd).

Appellant pleaded "true" to the enhancement paragraphs during the punishment phase of trial. But because the enhancement paragraphs did not include the requisite finality and sequencing language pursuant to Sections 12.42(d) and 12.425(b), the finality and sequencing of his prior convictions remained a fact issue during the punishment phase of trial. The court's charge did not include any language referring to the finding of sequential prior convictions in order to authorize punishment as an habitual offender. The charge addressed the enhancements contained in the indictment as follows:

> The indictment also alleges, in seven separate penalty paragraphs, that the defendant has previously been finally convicted of prior felony offenses to wit: Felony Escape, Unauthorized Use of a Motor Vehicle, Unauthorized Use of a Motor Vehicle, Felony Escape, Burglary of a Motor Vehicle, Burglary of a Motor Vehicle, and Robbery. To these allegations in the enhancement paragraphs the defendant has pleaded "True."
> . . . .
>
> You are instructed to find "True" the allegations of the Enhancement paragraphs, and for the offense of Aggravated Robbery assess the punishment of the defendant at confinement . . . for Life or for any term of not more than ninety-nine (99) years or less than twenty[-]five (25) years.
>
> For the offense of Unauthorized Use of a Vehicle, you are instructed to assess the punishment of the defendant at confinement . . . for any term of not more than twenty (20) years or less than two (2) years. In addition, you may assess a fine not to exceed $10,000.00.
>
> For the offense of Criminal Mischief, you are instructed to assess the punishment of the defendant at confinement . . . for any term of not more than twenty (20) years or less than two (2) years. In addition you may assess a fine not to exceed $10,000.00.

The verdict forms did not require the jury to make any findings regarding whether the prior

convictions used for enhancement were sequentially proved as required by Sections 12.42 (d) and 12.425(b) of the Texas Penal Code. Because the charge did not correctly apply the law to the facts in this case, the charge was improper, and instructing a jury with an improper charge is error.

Harm

When a charge does not correctly apply the law to the facts, we must consider whether such failure resulted in harm. *See* ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). If the error in the charge was the subject of a timely objection at trial, then reversal is required if the error is calculated to injure the rights of the defendant, which means that the error resulted in some harm to the defendant. ***Id***. at 171. The harm caused by the error must be assayed in light of the entire jury charge, the state of the evidence, including contested issues and the weight of probative evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole. ***Sanchez v. State***, No. PD-0961-07, 2012 WL 1694606, at *6 (Tex. Crim. App. May 16, 2012); ***Almanza***, 686 S.W.2d at 171. An erroneous or incomplete jury charge, however, does not result in automatic reversal. ***Abdnor v. State***, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). Appellant must have suffered actual harm, not merely theoretical harm. ***Sanchez***, 2012 WL 1694606, at *6.

Discussion

Appellant objected to the proposed (and ultimate) charge on several grounds—insufficient notice, failure to prove proper sequence, and that the proper instruction, based on the allegations in the indictment, would instruct the jury on determining punishment based on repeat offender status. Thus, we conclude that the charge error was properly preserved. Although the jury charge did not accurately apply the law to the facts in this case, the state of the evidence regarding Appellant's prior convictions supports the trial court's instruction that Appellant was an habitual offender and subject to an enhanced punishment range. The State's punishment evidence consisted of two pen packs containing Appellant's identifying information, judgments for the prior convictions alleged in the enhancement paragraphs, and sentence information for each conviction. We have reviewed these pen packs and determined that they contain sufficient information to satisfy the finality and sequencing requirements of Section 12.42(d) and 12.425(b). Appellant did not object to the admission of these pen packs at trial. Furthermore, Appellant pleaded true to the enhancement allegations contained in the indictment. Additionally, the fact of the prior convictions was not a contested issue at trial, and all parties, including Appellant, assumed the fact of the prior

convictions. *See* ***Kucha v. State***, 686 S.W.2d 154, 156 (Tex. Crim. App. 1985). Thus, the prior convictions were proved beyond a reasonable doubt. *See* ***id***. Finally, the jury assessed the maximum punishment for all three offenses Appellant committed on November 2, 2010. Because the maximum punishment range for the unenhanced felony of aggravated robbery is life imprisonment and the trial court ordered all of Appellant's sentences to run concurrently, the jury's sentence could not have been any longer, even if the State had not sought habitual offender status. *See* TEX. PENAL CODE ANN. § 29.03(b); *see also* ***id.*** § 12.42(d).

After reviewing Appellant's sentence in light of all of the uncontested evidence proving his habitual offender status, we cannot conclude that the erroneous charge resulted in "actual harm." *See* ***Sanchez***, 2012 WL 1694606, at *6. Accordingly, we overrule Appellant's third issue.

DISPOSITION

The judgment of the trial court is ***affirmed***.

SAM GRIFFITH
Justice

Opinion delivered September 12, 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

SEPTEMBER 12, 2012

NO. 12-11-00241-CR

BLAYNE LAMONT SMITH,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 349th Judicial District Court
of Houston County, Texas. (Tr.Ct.No. 10CR-300)

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.