Opinion issued June 18, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00032-CR

ALLEN KEITH HARVEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 421st District Court
Caldwell County, Texas
Trial Court Case No. 2018-132

O P I N I O N

Appellant, Allen Keith Harvey, was indicted on three counts of assault—two counts of assault by strangulation against a family member[1] and one count of

[1] *See* TEX. PENAL CODE § 22.01(a)(1), (b)(2)(B).

aggravated sexual assault.[2] Harvey pleaded guilty to the two counts of assault by strangulation in exchange for an agreed sentence of eight years' imprisonment to run concurrently with any sentence imposed for the aggravated sexual assault charge. Harvey was tried in a bench trial for the aggravated sexual assault. The trial court found him guilty and assessed a sentence of fifteen years' imprisonment, to run concurrently with the eight years imposed in connection with his plea to the two counts of assault by strangulation.[3]

In his sole issue on appeal, Harvey argues that the trial court's judgment of conviction for the aggravated sexual assault is void, and he is entitled to a reversal and remand to the trial court for further proceedings because he did not enter a plea to the court on that count of the indictment. Because the record in this case does not affirmatively show the contrary, we apply a presumption of regularity and presume that Harvey pleaded not guilty to the charge of aggravated sexual assault in the indictment. Accordingly, we affirm.

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2 *See id.* § 22.021(1)(A)(iii), (2)(A)(ii).

3 The Supreme Court of Texas transferred this appeal from the Court of Appeals for the Third District of Texas to this Court pursuant to its docket-equalization authority. *See* TEX. GOV'T CODE § 73.001 ("The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.").

Background

Harvey was charged in a single indictment, filed June 8, 2018, with three counts of assault against C.D., his former girlfriend. Two counts—one and three—involved assault by strangulation. The third count—count two in the indictment—charged that he committed aggravated sexual assault against C.D. In July and August 2018, Harvey sent letters to the trial court, indicating that he was willing to admit he had assaulted C.D., but he denied committing the aggravated sexual assault.

On July 19, 2018, Harvey signed a waiver of his right to be arraigned. The record contains notices of hearings in August, and two more letters written from Harvey to the trial court again stating that he admitted to assaulting C.D., but he denied sexually assaulting her.

The first recorded hearing occurred on November 6, 2018, when Harvey appeared for a plea hearing. The three-count indictment was read into the record. The trial court then summarized the reason for the hearing:

> [Court]: All right. It's my understanding that we're here today for a plea on Counts I and III, is that correct?
>
> [Defense]: It is.
>
> [State]: That's correct.
>
> [Court]: And I've been handed a jury waiver as pertains to Count II [the aggravated sexual assault charge].

[Defense]: Yes. Judge, we've already got a setting for trial to the court on November 30th.

[Court]: Okay. Mr. Harvey, I'm looking at this jury waiver. Do you understand what you have signed in that matter?

[Harvey]: Yes, sir. I do.

The trial court gave Harvey admonishments regarding his right to a jury trial on all three counts in the indictment, and it confirmed that Harvey wished to waive his right to a jury trial on the aggravated sexual assault and have the trial to the bench. Harvey answered in the affirmative. No one raised any concern or objection asserting that Harvey had not been given an opportunity to enter a plea of not guilty to the charge of aggravated sexual assault.

The trial court then admonished Harvey regarding his plea of guilty to the charges of assault by strangulation and confirmed that Harvey voluntarily entered the plea of guilty to those charges. The State presented its plea agreement with Harvey for the assaults by strangulation, and Harvey made his plea of guilty on the record as to those two charges. The parties indicated that they had an agreed recommendation on punishment—eight years' confinement—and the trial court ordered the preparation of a pre-sentence investigation report to be completed by November 30, stating, "Mr. Harvey, we will be back here on November 30th . . . for [the trial to the bench] on Count II and for sentencing on these two counts."

Harvey's jury waiver for the aggravated sexual assault charge appears in the record. It states that Harvey "intelligently, knowingly, and voluntarily" waived his right to a trial by jury as to both guilt/innocence and punishment, and it stated, "The Defendant shall be tried by the court on guilt/innocence and issue of punishment on Count 2-Aggravated Sexual Assault." The written plea agreements and Harvey's written "Plea of Guilty, Admonishments, Waiver, Stipulations and Judicial Confession" for the assaults by strangulation also appear in the record.

On November 30, 2018, Harvey again appeared before the trial court, this time for trial on aggravated sexual assault. The trial court called the case to trial:

> [Court]: And we're on Count II; is that correct?
>
> [State]: Yes, Your Honor. There's already been a plea and—
>
> [Court]: I and III?
>
> [State]: —punishment has been reset for after this bench trial is over.
>
> [Court]: Okay. All right. . . .

Nothing further was said on the record regarding Harvey's pleas to the various offenses in this case. The trial court heard the testimony of the various witnesses, including Harvey's own testimony. The trial was then recessed so that Harvey could subpoena and call an additional witness. The trial resumed on December 6, 2018. During his closing argument, Harvey's counsel argued that the State had failed to prove the offense, stating, "We believe there's a reasonable doubt as to

whether [the aggravated sexual assault] occurred. And we would ask you to find him not guilty of that offense." The trial court found Harvey guilty of the offense of aggravated sexual assault and assessed his punishment for that offense at 15 years' imprisonment, stating that the sentence would run concurrently with the agreed sentences for the assaults by strangulation.

The trial court's judgment of conviction for the aggravated sexual assault reflects that Harvey pleaded not guilty. It further reflects that the trial court found him guilty of the offense and assessed his punishment at confinement for 15 years, to run concurrently with his agreed sentences in the other two assault offenses.

Entry of Plea

In his sole appellate issue, Harvey argues that the trial court's judgment of conviction for aggravated sexual assault is void because he never entered his plea and, thus, the "proceedings amounted to a nullity." Harvey asks that we reverse his conviction and remand to the trial court for a new trial.

Harvey correctly asserts that a plea is required in every case. "It is well settled in this state that a plea must be entered in every criminal case and if no plea is entered, the trial is a nullity, since there is no issue for the jury or the court." *Lumsden v. State*, 384 S.W.2d 143, 144 (Tex. Crim. App. 1964); *Washington v. State*, 550 S.W.3d 340, 341 (Tex. App.—San Antonio 2018, no pet.); *Lincoln v. State*, 307 S.W.3d 921, 922 (Tex. App.—Dallas 2010, no pet.). The Code of

Criminal Procedure sets out requirements for defendants' pleas: "A plea of 'guilty' or a plea of 'nolo contendere' in a felony case must be made in open court by the defendant in person." TEX. CODE CRIM. PROC. art. 27.13. "The plea of not guilty may be made orally by the defendant or by his counsel in open court. If the defendant refuses to plead, the plea of not guilty shall be entered for him by the court." *Id.* art. 27.16(a). "The plea of not guilty shall be construed to be a denial of every material allegation in the indictment or information." *Id.* art. 27.17.

Harvey argues that because the record is silent as to whether he entered a plea to the charge of aggravated sexual assault, we must conclude that he did not enter a plea. He further argues that none of the records in this case—the records of his plea hearing, trial, the written waiver of arraignment, or jury waiver—reference a plea to the aggravated assault, so we must conclude that he did not enter one. We disagree.

"Recitals in a judgment create a 'presumption of regularity and truthfulness,' and these recitals are binding unless there is direct proof of their falsity." *Lincoln*, 307 S.W.3d at 922 (quoting *Breazeale v. State*, 683 S.W.2d 446, 450–51 (Tex. Crim. App. 1984)); *see Fields v. State*, 507 S.W.3d 333, 335–36 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding same in presuming that defendant was arraigned in absence of affirmative contrary showing). When a judgment contains a recital, the accused bears the burden of proving that the contrary is true. *Lincoln*,

307 S.W.3d at 924 (quoting *Breazeale*, 683 S.W.2d at 451); *see also State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013) ("When a person attacks the validity of his prior guilty plea as that plea is reflected in the written judgment, he bears the burden of defeating the normal presumption that recitals in the written judgment are correct. Those written recitals 'are binding in the absence of direct proof of their falsity.'") (quoting *Breazeale*, 683 S.W.2d at 450).

Texas Rule of Appellate Procedure 44.2(c) provides a second presumption applicable here: "Unless the [matter was] disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume . . . that the defendant pleaded to the indictment or other charging instrument[.]" TEX. R. APP. P. 44.2(c)(4); *Washington*, 550 S.W.3d at 341–42 (applying Rule 44.2(c)(4)'s presumption); *Lincoln*, 307 S.W.3d at 922 ("A second presumption operates in these circumstances as well: unless the record affirmatively shows the contrary, our appellate rules require us to presume [the defendant] pleaded to the indictment.").

The reporter's record in this case includes Harvey's plea of "guilty" to two counts of assault by strangulation. The reporter's record further indicates that Harvey did not intend to plead guilty to aggravated sexual assault and, instead, wished to have a bench trial on both guilt/innocence and punishment for that offense. The clerk's record includes letters supporting this intention as well, and

Harvey's judgment of conviction for aggravated sexual assault contains the written recital that he pleaded "not guilty" to that offense.

We presume that the trial court's written recital in the judgment that Harvey pleaded not guilty to aggravated sexual assault is truthful. *See Guerrero*, 400 S.W.3d at 583; *Breazeale*, 683 S.W.2d at 450–51; *Lincoln*, 307 S.W.3d at 922. The record indicates that, although Harvey entered a plea of guilty as to the assaults by strangulation, he wanted to have a trial before the bench on the charge of aggravated sexual assault. Thus, the record supports the presumption of regularity and truthfulness. *See Breazeale*, 683 S.W.2d at 450–51; *Lincoln*, 307 S.W.3d at 923–24 ("A silent record will not suffice as an affirmative showing and thus will not overcome presumptions of regularity."). Harvey has failed to carry his burden of proving that the trial court's recital in his judgment of conviction was contrary to the truth. *See Lincoln*, 307 S.W.3d at 924 (quoting *Breazeale*, 683 S.W.2d at 451).

Furthermore, the matter of Harvey's plea to aggravated sexual assault was not disputed in the trial court, nor does the record affirmatively show that he was not permitted to enter a plea to that charge. For example, there is no indication that he did not have an opportunity to consider his plea in this case or that he intended to enter a plea other than "not guilty." To the contrary, the record demonstrates that he considered his plea to the indictment, pleaded guilty to two of the counts, and

proceeded to trial on the remaining count. Accordingly, we presume that he pleaded to the indictment. *See* TEX. R. APP. P. 44.2(c)(4); *Washington*, 550 S.W.3d at 341; *Lincoln*, 307 S.W.3d at 922; *cf. Fields*, 507 S.W.3d at 335 (applying presumption in 44.2(c)(3) that defendant was arraigned).

Harvey asks us to reject the reasoning in *Washington* and *Lincoln* because he believes those cases run afoul of the dictate that "a plea is necessary in every criminal case and where none is entered the trial is a nullity." *See, e.g.*, *Lumsden*, 384 S.W.2d at 143; *Willis v. State*, 389 S.W.2d 464, 464 (Tex. Crim. App. 1965). Harvey cites *Ownby v. Harkins*, 705 S.W.2d 788 (Tex. App.—Dallas 1986, orig. proceeding), to support his argument. Harvey recognizes that *Harkins* has a "significantly different" procedural history than his own case, but he argues that the differences are "immaterial." Again, we disagree.

The Dallas Court of Appeals in *Lincoln* addressed its reasoning in its prior opinion in *Harkins*:

> In *Harkins*, the trial court called the case for trial, but the prosecutor was not present in the courtroom. The trial court immediately solicited and granted a motion for directed verdict in favor of the defendant. [*Harkins*, 705 S.W.2d at 789]. In a very real sense, the defendant's issues were never joined. Instead, the result of the proceedings was solely a function of the conduct of the prosecutor and the trial court's response to that conduct. The trial court subsequently signed a written order granting the motion for directed verdict. The order declared the State failed to appear and recited that the defendant had entered a plea of not guilty. *Id.* at 790. The State sought mandamus relief. Our opinion concluded:

> Although the order of the trial court recites that [the defendant] entered his plea of not guilty, this recitation does not control because the statement of facts shows the contrary. . . . The statement of facts at trial affirmatively shows that no inquiry was made as to how [the defendant] wished to plead and he did not enter a plea. Because no plea was entered, the trial, including the action of the trial court in granting a motion for a directed verdict of not guilty, was a nullity.

Lincoln, 307 S.W.3d at 923 (quoting *Harkins*, 705 S.W.2d at 789–90).

As did the court in *Lincoln*, we conclude that *Harkins* is distinguishable from the present case. The trial court inquired into how Harvey wished to plead, and at his plea hearing, he affirmatively pleaded guilty to two counts of the indictment and stated that he wished to proceed to trial on the remaining count. Harvey "had a trial in which issues were fully contested, and it is apparent that [he] took the position [he] was not guilty." *See id.* He testified to his own version of events, and, in closing arguments, Harvey's attorney asked the trial court to find Harvey not guilty. *See id.* Harvey did not object at trial or during any other proceeding to the trial court's alleged failure to take his plea to the charge of aggravated sexual assault. *See id.*; *see also Washington*, 550 S.W.3d at 341–42 (presuming appellant entered plea where "record does not affirmatively show the contrary"; recognizing that "Washington received a full trial on the charge against him after rejecting the State's plea bargain offer" and that "defense counsel's closing argument refers to the reason Washington believed he was not guilty of the charge").

Harvey also cites *White v. State*, 929 S.W.2d 502 (Tex. App.—Texarkana 1996, no pet.). That case is likewise distinguishable. The *White* court stated:

> It may be seen from the statement of facts that the fill-in-the-blank judgment does not reflect the actual proceedings. Although the document states that White pleaded guilty in open court and that he was there admonished, neither event actually occurred. White did sign a written stipulation admitting his guilt, but it was not placed in evidence or presented in open court. Consequently, even if it could otherwise serve as a plea of guilty, it could not in this instance.

929 S.W.2d at 504 (internal citations omitted). The court in that case held, "If a person has neither pleaded guilty to a crime nor been tried for the crime, he has not been convicted of the crime." *Id.* at 504–05.

Here, however, the trial court's judgment did not rest on a defective guilty plea. *See id.*; *see also Mendez v. State*, 138 S.W.3d 334, 343 (Tex. Crim. App. 2004) (holding that right to plead not guilty is "waivable-only" right that "must be implemented by the trial court unless expressly waived"). Harvey's right to plead not guilty was fully implemented by the trial court except where he expressly waived it by entering proper pleas of guilty to assault by strangulation. Harvey expressly pleaded guilty to two counts and was tried on the portion of the indictment that he did not plead guilty to, so this case is not a situation in which he "has neither pleaded guilty to a crime nor been tried for the crime." *See White*, 929 S.W.2d at 504–05.

Harvey further argues that application of the presumption of regularity and truthfulness and the Rule 44.2(c)(4) presumption that he pleaded to the charging instrument places upon him "the impossible burden of making 'an affirmative showing' of a negative." We observe, however, that litigants have been able to make such a showing in other cases. In *Willis*, the Court of Criminal Appeals reversed a conviction in relevant part because the appellant did not enter a plea. 389 S.W.2d at 464. The court observed, "The state does not seek an affirmance of the conviction, because it is shown by bill of exception #2 that appellant did not enter a plea in the case," and it recognized that the State's "position is well taken, as a plea is necessary in every criminal case and where none is entered the trial is a nullity." *Id.* In *Lumsden*, the Court of Criminal Appeals rejected the State's argument that appellant "waived his right to enter a plea before the jury" where appellant's bills of exception show that he did not refuse or decline to enter a plea and he timely objected to a recitation in the court's charge that he had pleaded "not guilty." 384 S.W.2d at 143–44. In both *White* and *Harkins*, discussed above, courts of appeals found that the record of proceedings did not support the trial court's recitations in the operative judgment or order. *See White*, 929 S.W.2d at 504–05; *Harkins*, 705 S.W.2d at 789–90. No such facts are present in this case. Harvey has not presented a record showing any objection or other evidence contradicting the trial court's recitation that he pleaded not guilty to the aggravated sexual assault.

We further observe that the application of the presumptions here leaves Harvey with all the benefits of having a plea of not guilty entered in this case. There is no indication that he intended to waive his right to plead not guilty, *see Mendez*, 138 S.W.3d at 343, and, in fact, the record affirmatively reflects that Harvey denied the allegations in the charge of aggravated sexual assault charge. His right to plead not guilty was fully implemented by the trial court and resulted in his receiving a trial on the merits in the charge of aggravated sexual assault. Harvey does not point to any right or presumption that was foreclosed because his express plea of not guilty does not appear in the record on appeal.

We overrule Harvey's sole issue on appeal.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

Publish. TEX. R. APP. P. 47.2(b).