Opinion issued July 7, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00103-CR

ADRIAN GALVEZ PLASENCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 18-CR-1928

MEMORANDUM OPINION

Adrian Galvez Plasencia was charged with aggravated assault with a deadly weapon and evading arrest or detention with a vehicle. *See* TEX. PENAL CODE §§ 22.02, 38.04(b)(2)(A). The issue on appeal involves the latter charge. After Plasencia pleaded guilty to the evading-arrest charge, the jury sentenced him to 10 years'

imprisonment and assessed a $5,000 fine and court costs. On appeal, Plasencia argues he was denied due process because the trial court failed to admonish him about the punishment range for evading arrest or determine that his plea was made freely and voluntarily before accepting his guilty plea. *See* TEX. CODE CRIM. PROC. art. 26.13(a)(1), (b). Because the record shows that Plasencia was made aware of the correct range of punishment by other means, we hold that the trial court's failure to admonish him was harmless error and affirm the judgment.

Background

Early one morning, P. Coleman was driving to his workplace from Dickinson, Texas. He exited Interstate 45 South and slowly approached a red light. As the light turned green, other cars drove off except for a large blue sedan. Coleman moved to the right lane to pass the blue car, drove through the intersection on the feeder road, and then turned right. As he parked at the locked entrance of his workplace, Coleman suddenly noticed that the blue car from earlier had pulled in behind him. Coleman became fearful. He turned into a field, went through a ditch, and headed towards the highway. The blue car followed.

Coleman called 911 after several unsuccessful attempts to get away from the blue car. He was transferred to various police agencies because he was driving through different cities. After closely tailing Coleman's truck, the blue car rammed into the back of Coleman's truck about five times while traveling at highway speeds.

Eventually, the blue car began pushing Coleman's truck along the highway, and Coleman worried his truck would roll over. Coleman then saw police cars, pulled into a nearby McDonald's restaurant, and waited for the police. Coleman noticed the blue car had made a U-turn in the opposite direction on the highway with the police in pursuit with their overhead lights and sirens activated.

Galveston police officers pursued the blue car on the highway at speeds of up to 115 miles per hour. The officers chased the blue car for approximately 10 minutes. Several other police agencies joined in the police chase as the blue car sped along the highway. Eventually, the officers deployed spike strips, causing the blue car to stop. Officers identified Plasencia as the driver of the blue car. Plasencia was arrested for aggravated assault with a deadly weapon and felony evading arrest with a vehicle.

At arraignment, the trial court informed Plasencia that he was charged with a second-degree felony of aggravated assault with a deadly weapon and a third-degree felony of evading arrest or detention with a vehicle. Plasencia pleaded guilty to the aggravated-assault charge and not guilty to the evading-arrest charge. The trial court accepted Plasencia's guilty pleas without admonishing him in compliance with Article 26.13 of the Texas Code of Criminal Procedure. Plasencia then filed an application for probation in the evading-arrest case.

During voir dire, the trial court described the evading-arrest charge as a third-degree felony carrying a punishment range of two to ten years in the penitentiary and a fine not to exceed $10,000. *See* TEX. PENAL CODE § 12.34. trial court also noted that probation was a possible punishment. The State reiterated the same punishment range for the evading-arrest charge to the potential jurors.

After the jury was empaneled and sworn, the trial court instructed the State to read the indictments. Plasencia pleaded guilty to the aggravated-assault charge and not guilty to the evading-arrest charge. The trial court did not provide Plasencia with his statutory admonishments. Instead, the trial court entered his pleas into the record and the State proceeded with opening arguments in the aggravated-assault case.

After the close of evidence, the trial court read the jury charge before deliberation, which included the statutory range of punishment. Plasencia did not object. Later, the jury convicted Plasencia of aggravated assault with a deadly weapon. The jury sentenced him to 8 years' confinement for the aggravated assault charge and 10 years' confinement for the evading-arrest charge, to run concurrently. In addition, the jury assessed a $5,000 fine and court costs on each case.

Plasencia appealed, contending the trial court erred when it failed to admonish him about the punishment range for the evading-arrest charge before accepting his guilty plea. He also contends that the record does not show that his plea was made

freely and voluntarily. The State concedes that the trial court erred in failing to admonish Plasencia but argues that the error was harmless.

Admonishments

A. Standard of review

A defendant's plea of guilty must be knowing and voluntary. *Ex parte Mable*, 443 S.W.3d 129, 131 (Tex. Crim. App. 2014). A trial court accepting a defendant's plea of guilty or nolo contendere must duly admonish the accused of, among other things, the range of punishment attached to the offense before it accepts a guilty plea. TEX. CODE CRIM. PROC. art. 26.13(a)(1). Further, it must appear "that the defendant is mentally competent and the plea is free[ly] and voluntary[ily]" made. *Id*. 26.13(b). Substantial compliance, as opposed to verbatim language, is effective to sufficiently warn the accused. *Id*. 26.13(c).; *see also Richards v. State*, 562 S.W.2d 456, 458 (Tex. Crim. App. 1977) (op. on reh'g). A trial court's failure to give a proper admonition under Article 26.13 is subject to a Rule 44.2(b) harm analysis under the Texas Rules of Appellate Procedure. *See Aguirre-Mata v. State*, 992 S.W.2d 495, 499 (Tex. Crim. App. 1999); *Torres v. State*, 59 S.W.3d 365, 367 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

Under Rule 44.2(b), any error, defect, irregularity, or variance must be disregarded unless it affected the defendant's substantial rights. *See* TEX. R. APP. R. 44.2(b). A defendant's substantial rights are affected if he "probably would not have

pleaded guilty but for the failure to admonish." *Burnett v. State*, 88 S.W.3d 633, 638 n.14 (Tex. Crim. App. 2002) (citing *United States v. Cuevas-Andrade*, 232 F.3d 440, 443–44 (5th Cir. 2000)). We must therefore reverse a conviction "if the record shows that a defendant was unaware of the consequences of his plea and that he was misled or harmed by the trial court's failure to admonish him regarding the range of punishment." *Burnett*, 88 S.W.3d at 638. But if the record shows that the defendant was made aware of the range of punishment by means other than formal admonishment, the failure to admonish does not affect the defendant's substantial rights and reversal is not warranted. *See, e.g.*, *id*. at 639–41 (holding where record was "replete with statements concerning the applicable range of punishment," trial court's failure to admonish on the issue, although clearly erroneous, was harmless).

In determining when a defendant's substantial rights are affected, we may consider whether the record shows that the defendant was aware or unaware of his punishment range, despite the trial court's failure to admonish him, as well as the strength of the evidence of guilt. *Bessey v. State*, 239 S.W.3d 809, 813 (Tex. Crim. App. 2007) (citing *Anderson v. State*, 182 S.W.3d 914, 919–21 (Tex. Crim. App. 2006)); *Burnett*, 88 S.W.3d at 638. We consider the record as a whole to determine whether the error affected the defendant's substantial rights. *See Bessey*, 239 S.W.3d at 813. In doing so, we may "consider record facts from which one would reasonably infer that a defendant did know the consequences of his plea or, in this case, was

actually aware of the range of punishment." *Burnett*, 88 S.W.3d at 638. "Record facts from any stage of the proceedings may raise such an inference, even if the events in question occurred after the entry of the guilty plea, so long as these post-plea circumstances reasonably reflect upon the defendant's knowledge at the time the plea was entered." *Gonzalez v. State*, No. 01-15-00394-CR, 2016 WL 1054713, at *2 (Tex. App.—Houston [1st Dist.] Mar. 17, 2016, pet. ref'd) (mem. op., not designated for publication) (citing *Davison v. State*, 405 S.W.3d 682, 689 (Tex. Crim. App. 2013)).

B. Analysis

1. Plasencia was aware of his punishment range

In applying the Rule 44.2(b) analysis to this case, we consider whether Plasencia was aware of the punishment range for pleading guilty to evading arrest with a vehicle. *See Bessey*, 239 S.W.3d at 813. The State concedes that the trial court did not properly admonish Plasencia as to the range of punishment. Nonetheless, the State contends that Plasencia suffered no harm as a result because Plasencia was well aware of the range of punishment. Specifically, the State argues that Plasencia was aware of the punishment range because he filed a motion for probation prior to voir dire and because the record shows the punishment range was discussed during jury selection and included in the jury charge, which was read aloud in Plasencia's presence without objection or an attempt to withdraw his plea.

While it is undisputed that the trial court did not admonish Plasencia on the range of punishment, the record also indicates that he was informed of the range of punishment by other means. First, we determine whether an inference can be raised that Plasencia's motion for probation made him actually aware of the range of punishment. At arraignment, the trial court stated the charges on the record and asked Plasencia if he met with defense counsel to discuss those charges. Plasencia replied, "Yes, sir." Plasencia then entered his pleas. The record does not indicate whether defense counsel's discussion with Plasencia included a discussion of the punishment range for his charges. The record is devoid of any discussion about the punishment range when Plasencia pleaded not guilty to the evading-arrest charge.

Despite no discussion about the punishment range, the record shows that Plasencia filed a motion for probation and requested the jury to suspend the "imposition of sentence" in the event he was convicted.[1] Defense counsel could have discussed the option of probation with Plasencia before Plasencia requested it. Stated differently, Plasencia could not have asked for probation had he not known about

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[1] The motion states:

> COMES NOW the Defendant in the above styled and numbered cause before the trial of this case has begun and files this application for probation and represents to the Judge and jury that he is the Defendant in said cause, that he has not before been convicted of a felony, and prays that in the event of a conviction in this case, that the imposition of sentence is suspended and that he/she be placed on probation as provided by law.

the availability of it. Further, the record shows that Plasencia testified at the punishment stage and requested probation from the jury. Based on these facts, we can reasonably infer that Plasencia was actually aware of the punishment range because he requested probation before trial and repeated his initial request at the punishment stage.

Next, we examine the discussion of the punishment range during voir dire to determine whether an inference can be raised that Plasencia was actually aware of the punishment. A discussion of the punishment range during jury selection raises an inference that "a defendant knew of the potential punishment he faced at the time of his plea." *Gonzalez*, 2016 WL 1054713, at *3. Plasencia was present at jury selection, during which the trial court explained the range of punishment for both charges to potential jury members. The trial court told the potential jurors that they would be required to assess punishment on both charges, even though he pleaded guilty to one charge and not guilty to the other. After the trial court concluded its discussion with the venire, the prosecutor echoed the same punishment range for the evading-arrest charge before questioning the potential jury members. Afterward, Plasencia pleaded guilty to the evading-arrest charge before the jury.

Because Plasencia had notice of the punishment range before he entered his plea in front of the jury, the trial court's failure to admonish Plasencia did not affect his substantial rights. *Valdez v. State*, 326 S.W.3d 348, 351 (Tex. App.—Fort Worth

2010, no pet.) (holding defendant's substantial rights were not affected despite trial court's failure to admonish on the punishment range where the attorneys, with the defendant present, explain the specific range of punishment to the venire during voir dire); *Gamble v. State*, 199 S.W.3d 619, 622 (Tex. App.—Waco 2006, no pet.) (holding prosecutor's explaining punishment range to defendant at trial court's direction and attorneys' discussion of punishment range during voir dire rendered harmless trial court's failure to admonish on punishment range).

Finally, we assess whether an inference can be raised that Plasencia was actually aware of the punishment based on the jury charge. We conclude that such an inference can be drawn here. The range of punishment was stated in the jury charge, which was read aloud in open court and in Plasencia's presence without objection, on-the-record reaction, or protest. *See Burnett*, 88 S.W.3d at 640 ("The jury charge, which detailed the range of punishment, was read aloud in open court. Defense counsel did not object to the charge. There was no on-the-record reaction or protest from appellant when the charge was read, when the jury returned its verdict on punishment, or at appellant's sentencing."); *Gonzalez*, 2016 WL 1054713, at *2 (drawing reasonable inference that appellant was aware of punishment range because jury charge was read in appellant's presence without objection). These circumstances support a reasonable inference that Plasencia was aware of the punishment range when he pleaded guilty.

In sum, we hold the trial court's failure to admonish on the range of punishment did not affect Plasencia's substantial rights and is harmless error because the record contains several references to the applicable punishment range that raises reasonable inferences that Plasencia was aware of the range of punishment when he pleaded guilty, and nothing in the record suggests that Plasencia was unaware of it. *See Burnett*, 88 S.W.3d at 641 (holding that trial court's failure to admonish defendant on range of punishment did not affect appellant's substantial rights when record contained references to correct range of punishment and nothing in record showed that appellant was unaware of consequences of plea or that he was misled or harmed).

2. The strength of the evidence of guilt favors the State

Finally, in determining the effect of the trial court's error on Plasencia's decision to plead guilty, we also consider the strength of the evidence of Plasencia's guilt. *See Bessey*, 239 S.W.3d at 813. In this case, the State presented substantial evidence of guilt of the offense of evading arrest or detention. *See* TEX. PENAL CODE § 38.04(a) (providing elements for evading arrest or detention); *Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005) (en banc) (same). Coleman testified that, after he pulled into the McDonald's parking lot, he saw the blue car driven by Plasencia involved in a police chase because Plasencia did not stop and pull over when officers were right behind him with their lights and sirens activated. Two

officers testified that they were involved in a high-speed chase with Plasencia for about 10 minutes. Finally, Plasencia testified that he knew the police were behind him and admitted that he evaded them. The defense presented no evidence that Plasencia was not guilty but instead tried to mitigate the damaging effect of the evidence.

Considering the record as a whole, we have fair assurance that no substantial right was affected by the trial court's error in failing to admonish appellant regarding the consequences of his guilty plea. As such, the error was harmless. *See* TEX. R. APP. P. 44.2(b). We overrule Plasencia's sole issue.

Conclusion

We affirm the trial court's judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Landau, Keyes, and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).