COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JOE RUBIO,	§	
	§	No. 08-18-00006-CR
Appellant,	§	
	§	Appeal from the
v.	§	
	§	Criminal District Court #1
THE STATE OF TEXAS,	§	
	§	of El Paso County, Texas
Appellee.	§	
	§	(TC# 20120D02166)
	§	

O P I N I O N

After the State agreed to dismiss Counts III and IV of a four-count indictment, Appellant Joe Rubio pleaded guilty to misapplication of fiduciary property having an aggregate value of $200,000.00 or more (Count I) and to theft of property having an aggregate value of $200,000.00 or more (Count II). Act of May 26, 1993, 73rd Leg. R.S., ch. 900, §1.01, secs. 31.03, 32.45, 1993 TEX.GEN.LAWS 3586, 3636, 3652 (amended 2015)(current version at TEX.PENAL CODE ANN. §§ 31.01(c)(7), 32.45(e)(7)). For each count, the trial court sentenced Appellant to confinement for thirty years but imposed no fines. On appeal, Appellant brings two issues complaining that the trial court erred by denying his motion to quash the indictment and by denying him counsel of his choice. We affirm the trial court's judgment.

DISCUSSION

As Appellant's issues allege trial court error, we relate the specifics only as necessary to fully address each of the issues raised.

I. Motion to Quash

A. Preservation

We first address the State's preservation argument, which contends that Appellant failed to obtain a ruling on his motion to quash the indictment. Rule 33.1(a)(2)(A) permits a trial court to rule implicitly on a party's request, objection, or motion made as a prerequisite to presenting a complaint for appellate review, and we must consider whether the trial court ruled implicitly on the motion to quash. TEX.R.APP.P. 33.1(a)(2)(A); *Gutierrez v. State*, 36 S.W.3d 509, 511 (Tex.Crim.App. 2001)(remanding case to court of appeals to consider whether the trial court made an implicit ruling on motion to suppress evidence).

Appellant declined to present any facts in his brief regarding his motion or any arguments made to the trial court during the hearing on his motion. The trial court heard the motion to quash and took it under advisement. Appellant asserts that the trial court subsequently denied the motion during an unrecorded chambers conference attended by counsel for Appellant and the State. The trial court later advised him during the plea hearing that he could appeal its ruling on the motion to quash. From the course of the proceedings and the trial court's plea comments, we conclude that the trial court implicitly denied the motion to quash the indictment and that Appellant has preserved this issue for our review.

B. Merits

In his first issue, Appellant presents four sub-issues by which he asserts that the trial court erred in denying his motion to quash the indictment.

1. Standard of Review

The sufficiency of an indictment is a question of law, and a trial court's ruling on a motion to quash an indictment that is based on the indictment, the motion to quash, and the argument of counsel is subject to *de novo* review. *State v. Rosseau*, 396 S.W.3d 550, 555 n.6 (Tex.Crim.App. 2013)(citing *Smith v. State*, 309 S.W.3d 10, 13–14 (Tex.Crim.App. 2010)); *State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App. 2004).

In his motion to quash the indictment in this case, Appellant asserted that Counts I and III of the indictment provided him insufficient notice of the charges against him and that Penal Code Section 32.45(c) is void for vagueness. He also alleged that Counts II and IV constitute the same offense as Counts I and III and thereby violate constitutional prohibitions against him being twice placed in jeopardy for the same offense.

2. Inadequate Notice

Appellant complains that the indictment should have stated the transactions that he allegedly conducted. The United States and Texas Constitutions provide an accused the right to be informed of "the nature and cause" of the accusation against him. U.S. CONST. Amend VI; TEX.CONST. art. I, §10. Appellant does not present any argument demonstrating that the terms of the indictment charging him in this case failed to adequately inform him of the charges against him and that he was unable to prepare a defense because of the inadequate notice. Rather, he asserts that "the indictment should state transactions that [he] allegedly conducted."

As a general rule, an indictment must provide "the defendant notice of precisely what he is charged . . . so that he may prepare an adequate defense." *Moff*, 154 S.W.3d at 603; TEX.CODE CRIM.PROC.ANN. art. 21.11. However, when "each unauthorized transaction was a separate criminal act but together constitutes the single offense of misapplication of fiduciary duty, details

regarding the specific acts on which the State intends to rely are not required to be listed in the indictment, as long as they are provided by some other means." *Moff,* 154 S.W.3d at 603; *see Kellar v. State,* 108 S.W.3d 311, 313 (Tex.Crim.App. 2003)(explaining that when a charge of aggregated theft is alleged, the indictment must allege a continuing-course-of-conduct element, and where the language "pursuant to one scheme or continuing course of conduct" is alleged, the indictment need not specify the acts of theft that are aggregated). Here, the indictment contains the aggregating language of Penal Code Section 32.03 and alleges a single offense of aggravated misapplication of fiduciary funds. TEX.PENAL CODE ANN. § 32.03 ("When amounts are obtained in violation of this chapter pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated in determining the grade of offense."); *see Kellar*, 108 S.W.3d at 313–14. Because the indictment contains aggregating language of penal code Section 32.03, the State was not required to allege each separate misapplication of fiduciary funds.

When a trial court overrules a motion to quash, a defendant suffers no harm unless he did not receive notice of the State's theory against which he would have to defend. *Kellar*, 108 S.W.3d at 313. During the hearing on his motion to quash, Appellant argued that the State had provided extensive discovery along with a breakdown of his expenses by category but complained that the State had not identified whether any transactions were authorized or unauthorized. Relying on *Moff*, *Kellar*, and *State v. Castorena*, the State countered that it was not required to identify in the indictment the specific transactions on which it intended to rely and noted that it had provided discovery, including attached phone records, of "perhaps over a thousand pages worth of documentation that details what the State's case is all about." *Kellar*, 108 S.W.3d at 314 (explaining that State had provided appellant actual notice of the specific instances of theft upon

which the State was basing its allegations when it provided appellant four binders of documentation showing 149 instances of alleged theft and had filed a list itemizing the transactions upon which the State intended to rely as well as bound copies of business records and affidavits to be introduced as evidence); *Moff*, 154 S.W.3d at 603 (explaining that the State is not required to lay out its aggregate offense case in the indictment but may not conduct "trial by ambush" by burying in a mass of documents the information necessary to provide notice to the defendant); *State v. Castorena*, 486 S.W.3d 620, 633 (Tex.App.—San Antonio 2016, no pet.)(agreeing that under *Kellar*, appellant had failed to show a constitutional violation founded on lack of notice where State filed business record affidavits containing 434 pages of phone records on which State intended to base its prosecution and noting that appellant had failed to file a motion to specify in which he could have sought more specific information about the particular information the State intended to use at trial). The record shows that the State filed a notice of self-authenticated business records consisting of twenty-four pages and two "disks" accompanied by five business record affidavits and that it had filed copies of business records—on which it would rely in prosecuting the case against Appellant. Appellant does not allege nor argue that he did not receive notice of the State's theory against him. Appellant has failed to show that the trial court improperly denied the motion to quash on this basis.

b. Fiduciary Relationship Not Alleged

Appellant summarily asserts that the indictment should have alleged "a particular fiduciary relationship" and declares without examination that "[w]ithout knowing the alleged relationship a defendant cannot prepare a defense because paragraph C of the statute is broad enough to include a multitude of relationships." This is the entirety of Appellant's sub-issue. It is accompanied by citation to—but presents no discussion of—the constitutional, statutory, and case citations on

which he previously has relied above in challenging the indictment for its failure to set out each alleged act of misapplication of fiduciary property. Appellant does not argue or apply legal principles in support of his contention. Although referenced, Appellant does not cite a statutory provision containing a "paragraph C" in his presentation of this sub-issue.

Rule 38.1(i) requires that a brief contain a clear and concise argument for the contentions made with appropriate citation to authorities and the record. TEX.R.APP.P. 38.1(i). An issue or point of error is waived where it is supported by an inadequate argument. *See Lilly v. State*, 365 S.W.3d 321, 326 (Tex.Crim.App. 2012) (declining to address Appellant's federal and state constitutional issues because he failed to provide individual substantive analysis to support his claims); *Swearingen v. State*, 101 S.W.3d 89, 100 (Tex.Crim.App. 2003)(en banc)(holding that appellant's failure to apply the law to facts as required by Rule 38.1 waived point of error and any error for failure to adequately brief); *Aldrich v. State*, 928 S.W.2d 558, 559 n.1, 560 (Tex.Crim.App. 1996)(declaring that appellant's complaints were inadequately briefed and presented nothing for review because he offered no argument or authority regarding them); *Lewis v. State*, 911 S.W.2d 1, 5 n.8 (Tex.Crim.App. 1995)(declaring that appellant's mere statement raising complaint, without citation to authority or the making of any argument in support thereof, rendered that portion of appellant's point of error inadequately briefed); *Smith v. State*, 907 S.W.2d 522, 532 (Tex.Crim.App. 1995)(en banc)(holding point of error was inadequately briefed because appellant failed to apply the law to the facts and show why he should prevail). Because Appellant has made no argument in support of this sub-issue nor has applied the law to show why he should prevail, it is inadequately briefed.

3. Void for Vagueness

Appellant next asserts that the definition of the term "fiduciary" under Penal Code Section 32.45(a)(1)(C) is unconstitutionally void for vagueness. TEX.PENAL CODE ANN. § 32.45(a)(1)(C). Section 32.45(a)(1)(C) provides that the term "fiduciary" includes "any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code[.]" *Id.* In *Berry v. State*, the Texas Court of Criminal Appeals examined both the generic definition of "fiduciary" as set out in Section 32.45(a)(1)(C) as well as the statute's failure to define "acting in a fiduciary capacity." 424 S.W.3d 579, 583 (Tex.Crim.App. 2014). The Court held that under Section 32.45(a)(1)(C), a person "'acts in a fiduciary capacity'" if the person's relationship with another is based not only on trust, confidence, good faith, and utmost fair dealing, but also on justifiable expectation that the actor will place the interests of the other party before his own. *Id.* at 585.

In light of these definitions, Appellant asserts that "[Section 32.45(a)(1)(C)] is so overbroad [that] it violate[s] due process." Appellant quotes three United States Supreme Court opinions and, without analysis or application of the principles espoused in those opinions to him or his void-for-vagueness contention, ends his sub-issue.

We review the constitutionality of a statute *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex.Crim.App. 2013). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Wagner v. State*, 539 S.W.3d 298, 313 (Tex.Crim.App. 2018)(citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). However, the Court of Criminal Appeals long ago determined that an assertion, as Appellant makes here, that Section 32.45 is impermissibly overbroad—that is, that "in addition to proscribing activities which may constitutionally be forbidden, it sweeps within its coverage speech or conduct

which is protected by the First Amendment"—is without merit as the provision criminalizes only conduct and does not improperly penalize speech. *Bynum v. State*, 767 S.W.2d 769, 772-73 (Tex.Crim.App. 1989)(en banc)(citing *City of Houston v. Hill*, 482 U.S. 451, 458 (1987), *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1981), *and Clark v. State*, 665 S.W.2d 476 (Tex.Crim.App. 1984)); *see also State v. Johnson*, 475 S.W.3d 860, 864 (Tex.Crim.App. 2015)(explaining that, ordinarily, a facial challenge to constitutionality of a statute is successful only when it is shown that the statute is unconstitutional in all of its applications). Fiduciary status does not constitute "conduct." *See Bynum*, 767 S.W.2d at 772 (citing *Showery v. State*, 678 S.W.2d 103, 108 (Tex.App.—El Paso 1984, pet. ref'd)("Appellant's fiduciary status did not constitute 'conduct' and the general understanding of the term fiduciary is sufficient to notify him of the nature of the duty allegedly breached.")).

When a defendant challenges a statute as being unconstitutionally vague and—as here—no First Amendment rights are involved, we only scrutinize the statute to determine whether it is impermissibly vague as applied to the challenging party's specific conduct. *Bynum*, 767 S.W.2d at 774. It is incumbent upon a defendant challenging the constitutionality of a statute to show that in its operation the statute is unconstitutional to him in his situation. *Id*. (citing *Briggs v. State*, 740 S.W.2d 803, 806 (Tex.Crim.App. 1987)). Appellant has not presented us with any possible unconstitutional applications of the statute, aside from simply arguing that the statute is unconstitutional. Appellant has failed to show that Section 32.45(a)(1)(C) is unconstitutionally vague as applied to his conduct or that—in light of the *Berry* definition of "acting in a fiduciary capacity"—the statute is overbroad and violates due process as he has alleged. *Berry*, 424 S.W.3d at 583.

4. Multiple Punishments for the Same Offense

In his motion to quash the indictment, Appellant asserted that the theft offenses alleged in Counts II and IV of the indictment constitute the same offenses as the misapplication-of-fiduciary-property offenses alleged in Counts I and III in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, section 14 of the Texas Constitution, and Article 1.10 of the Texas Code of Criminal Procedure. U.S. CONST. Amends. V, XIV; TEX.CONST. art. I, § 14; TEX.CODE CRIM.PROC.ANN. art. 1.10. Appellant asserts that the trial court should have quashed the theft counts.

The Double Jeopardy Clause of the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. CONST. Amend. V. The United States Supreme Court has determined that the Fifth Amendment offers three separate constitutional protections against double jeopardy, one of which protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *Loving v. State*, 401 S.W.3d 642, 646 (Tex.Crim.App. 2013); *Ex parte Cavazos*, 203 S.W.3d 333, 336 (Tex.Crim.App. 2006). When multiple offenses are prosecuted at a single trial, the Double Jeopardy Clause "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

In *Blockburger v. United States,* the Supreme Court held that where the same conduct violates two distinct penal provisions, the test to determine whether the two offenses are the same is whether each provision requires proof of a fact that the other does not. *Blockburger v. United States,* 284 U.S. 299, 304 (1932). In *Ervin v. State,* the Court of Criminal Appeals recognized that the *Blockburger* test cannot authorize two punishments where the Legislature clearly intended only one. *Ervin v. State,* 991 S.W.2d 804, 807 (Tex.Crim.App. 1999). Consequently, in the

context of multiple offenses, the *Blockburger* test is simply a rule of statutory construction that is useful in ascertaining legislative intent. *Id*. (citing *Hunter,* 459 U.S. at 366–68). Absent a clear indication to the contrary, it should be presumed that if the offenses are the same under the *Blockburger* test, then the legislature did not intend to authorize multiple punishments for both offenses. *Hunter,* 459 U.S. at 366–68. A defendant suffers multiple punishments in violation of the Double Jeopardy Clause when he is convicted of more offenses than the legislature intended. *Ball v. United States*, 470 U.S. 856, 865 (1985).

Although Appellant references the *Blockburger* test established by the United States Supreme Court—which presumes that if two offenses have different elements, the offenses are different for double-jeopardy purposes and multiple punishments are not barred—and the Texas Court of Criminal Appeals' *Ervin* factors for rebutting the presumption and ascertaining whether the Legislature intended multiple punishments, he summarily states without analysis or argument that "[t]heft is clearly the same [offense as misapplication of fiduciary property] under the *Ervin* factors." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Ervin v. State*, 991 S.W.2d 804, 814 (Tex.Crim.App. 1999). After presenting no analysis under the *Blockburger* test or application of the *Ervin* factors, Appellant declares that the trial court should have quashed the counts alleging theft under *Bigon v. State*, 252 S.W.3d 360, 372–73 (Tex.Crim.App. 2008)("When a defendant is subjected to multiple punishments for the same conduct, the remedy is to affirm the conviction for the most serious offense and vacate the other convictions.").

Under the *Blockburger* test, the two offenses for which Appellant was indicted each require a proof of fact that the other does not. The misapplication of fiduciary property statute requires proof that the defendant was a fiduciary and that there was an agreement under which the defendant held the property for the benefit of another. *See* TEX.PENAL CODE ANN. § 32.45(a), (b). The theft

statute requires proof that the defendant unlawfully appropriated the property with the intent to deprive the owner of the property. *See* TEX.PENAL CODE ANN. § 31.03(a). Thus, each of the offenses for which Appellant was tried and convicted had a unique element and are not the "same offense" under the *Blockburger* test.

> To determine whether the legislature intended multiple punishments, we consider:
>
> (1) whether the offenses are contained within the same statutory section;
>
> (2) whether the offenses are phrased in the alternative;
>
> (3) whether the offenses are named similarly;
>
> (4) whether the offenses have common punishment ranges;
>
> (5) whether the offenses have a common focus (that is, whether the gravamen of the offenses is the same) and whether that common focus tends to indicate a single instance of conduct;
>
> (6) whether the elements that differ between the offenses can be considered the same under an imputed theory of liability (that is, a liberalized Blockburger standard utilizing imputed elements); and
>
> (7) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double-jeopardy purposes.

Ervin, 991 S.W.2d at 814.

We have applied the *Ervin* factors and conclude that the theft and misapplication of fiduciary property offenses are not contained in the same statutory section, are not phrased in the alternative, and are not similarly named. The offenses do not have a common focus—only a person acting as a fiduciary may commit misapplication of fiduciary property. *See Talamantez v. State*, 790 S.W.2d 33, 37 (Tex.App.—San Antonio 1990, pet. ref'd). We do not find nor does Appellant direct us to any legislative history which articulates the legislature's intent to treat these offenses as the same for double jeopardy purposes. *See Ervin*, 991 S.W.2d at 814. The only factor in favor of Appellant's contention is the common punishment ranges of the first-degree felony offenses.

See TEX.PENAL CODE ANN. §§ 12.32, 31.03(e)(7), 32.45(c). Appellant has failed to show that the legislature intended that these two offenses are to be treated the same for double jeopardy purposes. *See Duvall v. State*, 59 S.W.3d 773, 777–78 (Tex.App.—Austin 2001, pet. ref'd)(holding that defendant failed to show that two different offenses should be considered the same where the only applicable *Ervin* factor was similarity in degree and punishment range of the offenses).

Because Appellant has failed to show that the trial court erred in denying his motion to quash the reindictment, we overrule Issue One.

II. Counsel of Choice

In his second issue, Appellant asserts that the trial court improperly deprived him counsel of his choice and that the trial court's ruling requires reversal of his conviction. In support of his assertion, Appellant relies on the United States Supreme Court's observation in *United States v. Gonzalez-Lopez* that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006)(citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–625 (1989)); U.S. CONST. Amend VI.

In *Gonzalez-Lopez*, the District Court had repeatedly and erroneously denied motions for admission that Gonzalez-Lopez's counsel of choice had filed. 548 U.S. at 143–44, 150, 152. The Supreme Court held that the District Court had violated Gonzalez-Lopez's Sixth Amendment right to paid counsel of his choosing, and because the error was structural, it was not subject to harmless-error analysis. 548 U.S. at 143–44, 150, 152. However, the Supreme Court elucidated, "Nothing we have said today casts any doubt or places any qualification upon our previous holdings that

limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them." 548 U.S. at 151. It added:

> We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel. [Internal citations omitted].

United States v. Gonzalez-Lopez, 548 U.S. at 152.

"[A] defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. State of Ala.*, 287 U.S. 45, 53 (1932). However, an accused's right to represent himself or select his own counsel cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *Webb v. State*, 533 S.W.2d 780, 784 (Tex.Crim.App. 1976). Accordingly, an accused may not wait until the day of trial to demand different counsel or to request that counsel be dismissed so that he may retain other counsel. *Id*.

Appellant waived arraignment on May 7, 2012. During his representation by counsel Theresa Caballero, Appellant's jury trial was originally set for August 30, 2013 and was then reset to December 12, 2013. In December 2013, the trial court granted Appellant's motion to substitute attorney Ruben P. Hernandez as attorney of record in place of counsel Theresa Caballero. Hernandez entered his appearance as Appellant's counsel on April 4, 2014. Under Hernandez's representation, Appellant sought and obtained continuances to five jury-trial settings that the trial court had scheduled between May 23, 2014 and August 7, 2015. A "Special Setting Jury Trial" was also set for December 4, 2015, but the case did not proceed to trial.

During a pretrial hearing on December 11, 2015, the trial court considered Hernandez's request to withdraw as counsel. The trial court advised Appellant:

> [T]his is the first time that I've dealt with you on this case. But I've reviewed the file. And I don't know if you're playing games or not. To me, it seems like you are. I agree with the State that I think you're playing the odds here so that you don't face the consequences of going to trial, but I told you last week and I'll tell you again, I am not continuing this case. We will set it for trial next year. It will go to trial. . . . So we called Mr. [Ray] Velarde's office. He says you have not hired him.

After initially responding that he had retained Velarde, Appellant conceded that he had only consulted—but had not paid nor signed a contract—with Velarde. The court further commented:

> I cannot believe that last week I told you and I told you clearly what you had to do. And you still didn't do it. . . . It stops here. No more games. No more delays. No more continuances. Enough.

In response to Hernandez's contention that Appellant was entitled to counsel of his choice, the trial court responded:

> This is all a creation of Mr. Rubio. Okay. . . . Even when I'm telling him that we spoke to Mr. Velarde's office and I'm telling you, Mr. Rubio, that you did not hire him. You're telling me, Yes, I did.

The trial court advised that it would take Hernandez's motion under advisement and would allow Appellant the opportunity to hire Velarde by the following Wednesday—when Appellant claimed that he would be able to meet with Velarde—but warned again that the case would be tried in the new year and that no requests for continuances would be granted.

On December 16, 2015, the trial court granted Hernandez's motion to withdraw as counsel and on the following day appointed the public defender's office to represent Appellant. The record shows that the public defender's office filed motions to properly aid in Appellant's preparation for and defense at trial but does not show that it sought any continuances. The trial court again set a "Special Setting Jury Trial" for April 29, 2016, which was reset to September 9, 2016, July 28, 2017, and eventually September 1, 2017.

During the final conference on August 31, 2017, the eve of trial, the public defender disclosed to the trial court that Appellant had $150,000.00 with which he wished to make a plea bargain and stated a belief that Appellant was no longer indigent. Appellant informed the trial court that he wished to retain Ray Velarde to represent him at trial. Velarde was present at the hearing and admitted that he was not prepared to proceed to trial the following day. The trial court commented:

> All right. . . . Mr. Rubio, I understand [that] you're entitled to your own attorney. I understand that now you have the funds which no longer make you indigent. But I also have notes that are reflected in this Court's file. So[,] we're going to trial tomorrow.
>
> If you want to use part of that money . . . for restitution . . . that's fine. . . . You can hire Mr. Velarde and he can sit during the course of the trial with the attorneys that are ready to go to trial, but I'm not going to continue this case any further.
>
> This case has been continued numerous times. You've changed attorneys . . . [I]f you want, you can use those a hundred thousand dollars to hire Mr. Velarde to observe the case or consult with your attorneys, but we're going to trial tomorrow. . . . I will not continue this case any further.

In a subsequent proceeding that day, Appellant pleaded guilty to Counts I and II in exchange for the State's dismissal of Counts III and IV of the indictment.

Unlike *Gonzalez-Lopez*, the record in this case demonstrates that the trial court did not erroneously or repeatedly deny Appellant his Sixth Amendment choice of counsel. 548 U.S. at 143–44, 150, 152; *Webb*, 533 S.W.2d at 784. The trial court expressly permitted Appellant to hire Velarde and to have him present at trial to assist Appellant's other defense counsel.

Appellant additionally asserts that "Velarde needed a continuance to effectively represent Rubio and the Court refused to entertain one . . . ." Appellant did not request a continuance or seek additional time to prepare for trial and did not object to the trial court's declaration that the case would proceed to trial as scheduled. Therefore, Appellant has not preserved this complaint for our review. TEX.R.APP.P. 33.1(a). We overrule Appellant's second issue.

We note that the trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he has been informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX.R.APP.P. 25.2(d). We thus find that the certification is defective and has not been corrected either by Appellant's attorney or the trial court.

To remedy this defect, the Court ORDERS Appellant's attorney, pursuant to TEX.R.APP.P. 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. Appellant's attorney is further ORDERED, to comply with all the requirements of TEX.R.APP.P. 48.4.

CONCLUSION

We affirm the trial court's judgment.

June 26, 2020

YVONNE T. RODRIGUEZ, Justice

Before Alley, C.J., Rodriguez, and Palafox, JJ.

(Do Not Publish)