Affirmed and Majority and Concurring Opinions filed June 30, 2020.

In the

Fourteenth Court of Appeals

NO. 14-18-00229-CR
NO. 14-18-00231-CR

TRAVION DEPAUL FOUNTAIN, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause Nos. 16-DCR-074044A and 16-DCR-074054A

C O N C U R R I N G O P I N I O N

The court addresses "unassigned error," a potential error by the trial court that appellant has not asserted on appeal. Appellant waived this potential error — the trial court's failure to make oral findings as to enhancement of punishment — by failing to preserve it in the trial court. Even if appellant had preserved error, it would afford no basis for relief because the complaint lacks merit. For these reasons, the court should not address this unpreserved, unassigned, and

unmeritorious issue.

According to the murder indictment's enhancement paragraph, before the commission of the charged offense, appellant was convicted of the felony offense of possession of a controlled substance. In its judgment for the murder offense, the trial court stated that appellant pleaded "true" to this enhancement paragraph and that the trial court found it to be true. The trial court assessed punishment at 24 years' confinement for the murder offense and ten years' confinement for the unlawful-possession-of-a-firearm-by-a-felon offense. The reporter's record reflects that in addition to pleading "true" to the enhancement paragraph in the murder indictment, appellant stipulated to the prior felony conviction. The reporter's record does not reflect that the trial court made an oral pronouncement that it found the enhancement paragraph to be true or an oral pronouncement that the trial court assessed punishment for the murder offense based on the enhanced range of punishment for first-degree felonies under Penal Code section 12.42(c)(1).[1]

In a multi-paragraph footnote that spans pages of the majority opinion, the court addresses the trial court's failure to make any oral findings as to enhancement of punishment, an unnecessary exercise that principles of judicial restraint call the court to resist.[2]

In a criminal appeal, this court may exercise its discretion to address "unassigned error," but to prevail on the point, the appellant still must have satisfied the preservation-of-error requirements as to the complaint.[3] Appellant did not voice any complaint in the trial court as to the trial court's failure to make

[1] *See* Tex. Pen. Code Ann. § 12.42(c)(1) (West, Westlaw through 2019 R.S.).

[2] *See ante* at 2–3, n.1.

[3] *See Pena v. State*, 285 S.W.3d 459, 464–65 (Tex. Crim. App. 2009).

either oral pronouncement, thus forfeiting this point for appeal.[4] In any event, the trial court did not err by failing to make either oral pronouncement.[5]

The majority also analyzes whether this court should exercise its authority to modify sua sponte the trial court's judgment on the murder offense to correct an inaccuracy.[6] But, the majority does not explain what potential error might be contained in the trial court's judgment that might need modification.[7] Each statement in the judgment is correct. The trial court does not state in the judgment that the trial court made an oral pronouncement that it found the enhancement paragraph to be true, nor does the trial court state that it made an oral pronouncement that it assessed punishment based on the enhanced range of punishment for first-degree felonies under Penal Code section 12.42(c)(1).

The majority states that this court must ensure that the trial court accurately memorialized in the written judgment the sentence orally pronounced.[8] The trial court orally pronounced a sentence of 24 years' confinement for the murder offense and a sentence of ten years' confinement for the unlawful-possession-of-a-firearm-by-a-felon offense. In each judgment, the trial court recited the same sentence that the court orally pronounced. Neither appellant nor any other source suggests that in either judgment the trial court deviated from the oral pronouncement of sentence, and no party on appeal raises the issue. While a reviewing court may choose to examine unassigned error, once the court

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[4] *See Reed v. State*, 500 S.W.2d 497, 498–99 (Tex. Crim. App. 1973); *Newby v. State*, 169 S.W.3d 413, 416 (Tex. App.—Texarkana 2005, pet. ref'd).

[5] *See Reed*, 500 S.W.2d at 499; *Seeker v. State*, 186 S.W.3d 36, 39 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

[6] *See ante* at 2–3, n.1.

[7] *See id*.

[8] *See id*.

determines that the appellant failed to preserve error on the unassigned point and that the issue lacks merit, the decision to then analyze the point in the court's opinion wastes judicial resources, distracts from the issues appellant chose to present, and opens the door to obiter dicta.

In this case, as in most, appellant could have raised in the trial court various complaints that lack merit. But, unpreserved and unmeritorious complaints provide no basis for this court to change the trial court's judgment, and no need exists to address these complaints if appellant has not raised them on appeal. This court has discretion to address in its opinion unassigned error that was not preserved in the trial court and that lacks merit.[9] Still, the better course would be to avoid the obiter dicta this exercise produces and instead to treat the complaint as to the oral enhancement pronouncements in the same way that the court treats every other unpreserved, unassigned, and unmeritorious complaint—by not mentioning it in the court's opinion.[10]

In every appeal, this court examines the trial court's judgment, and in criminal appeals this court sua sponte may correct inaccurate statements in the trial court's judgment.[11] Though this court may explain that it has scrutinized the trial court's judgment and found no inaccurate statements that need correction, there is no need to do so. The majority points to case law that clothes it with authority to correct inaccurate statements in the trial court's judgment.[12] That response misses the point. It is not a question of whether the court *can* do it but whether the court

[9] *See Luckenbach v. State*, 523 S.W.3d 849, 856 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

[10] *See ante* at 2–3, n.1.

[11] *See French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

[12] *See ante* at 2–3, n.1.

should do it.

Viewing restraint as the sounder option, I respectfully decline to join the majority opinion, though I concur in the court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant (Spain, J., majority).

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