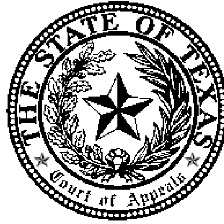
Affirmed in part and reversed and remanded in part and Opinion filed January 17, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-01358-CR

JOHN PATRICK DUMESNIL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th Judicial District
Harris County, Texas
Trial Court Cause No. 837,259

O P I N I O N

Appellant, John Patrick Dumesnil, was charged by indictment with indecency with a child. A jury found appellant guilty and assessed punishment at five years' confinement in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant asserts several points of error challenging his conviction. We affirm in part and reverse and remand in part.

I. Factual Background

Complainant, S.F., a six-year-old child, lived across the street from appellant. S.F. testified that appellant had a music room in his trailer and would invite the neighborhood children over to sing in the studio. S.F. also said that appellant had a lot of adult and children's movies and would invite the neighborhood children over to watch them. On the particular night in question, according to testimony in the record, appellant went to S.F.'s house and asked S.F's mother if S.F. could come over after dinner and watch movies. S.F.'s mother agreed. S.F. fell asleep in the middle of watching "Flubber." When she awoke, she found herself in appellant's bedroom without her shorts or underwear on. S.F. testified that, while in appellant's bedroom, appellant touched her vaginal area.

S.F. told two of her friends what appellant did to her. S.F. hesitated to tell her mother because she was ashamed and embarrassed, but her friends convinced her that she should. Upon learning of S.F.'s allegations, S.F.'s mother took her to the school counselor. The school counselor instructed S.F.'s mother to call the police. Detective Torres met with S.F. and her mother at the Childrens' Assessment Center where S.F. gave a statement to an assessment center employee who specializes in interviewing children. Detective Torres contacted appellant and asked him to come in to discuss the incident. Appellant arranged a meeting with Detective Belton. Although he was not in custody, Detective Belton read appellant his *Miranda* rights and asked him to sign a statement which said that he understood his rights and he knowingly, intelligently, and voluntarily waived them. Appellant signed the statement.

Detective Belton advised appellant why he was there and asked appellant if there was anything he wanted to say. At first, appellant stated that he did not do anything. However, Detective Belton testified that later in the interview, during a smoke-break, appellant said he "did it." At that point, they went back inside and Detective Belton testified that he asked appellant if he wanted to give a written statement and he said that he did. Appellant, however, testified that Detective Belton told him how to word the statement and coerced him

to sign the statement by threatening that if he did not sign it, Detective Belton would "hunt [him] down and take [him] to prison for [twenty-five] years."

Appellant was convicted of indecency with a child and sentenced to five years' confinement in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant asserts the following points of error: (1) the trial court abused its discretion in excluding testimony that would have shown a State's witness was biased and had a motivation to testify falsely; (2) the trial court erred in failing to conduct a hearing regarding the voluntariness of appellant's confession; (3) the trial court erred by admitting appellant's confession; (4) the trial court erred when it incorrectly instructed the jury on the applicable parole law; (5) appellant was denied effective assistance of counsel during the guilt/innocence phase of the trial; and (6) appellant was denied effective assistance of counsel during the punishment phase of the trial.

II. Exclusion of Testimony–Point of Error One

A. Standard of Review

The admission of relevant evidence is largely left to the discretion of the trial court. *Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)). Absent an abuse of discretion, the trial court's decision will not be reversed on appeal. *Id*.

B. Discussion

Appellant contends the trial court erred in excluding the testimony of Craig Owens, a witness for appellant, because it was admissible to impeach the testimony of another witness, complainant's mother, and to show her possible bias and motivation to testify falsely.

The credibility of a witness may be attacked through the use of opinion or reputation testimony. TEX. R. EVID. 608(a). Rule 608 of Texas Rules of Evidence prohibits the use of

specific instances of conduct "for the purpose of attacking or supporting [a] witness' credibility, other than conviction of a crime as provided in Rule 609." TEX. R. EVID. 608(b). This prohibition, however, is inapplicable where a party seeks to prove a witness' bias or motive to testify falsely. *Lagrone v. State*, 942 S.W.2d 602, 612–13 (Tex. Crim. App. 1997). Specific instances of conduct are also admissible to expose bias or correct an affirmative representation made during direct examination. *Id*. at 613. However, this rule is inapplicable to this case because the alleged misrepresentation happened on cross-examination by the appellant, not direct-examination by the State.

On cross-examination, appellant asked S.F.'s mother if she had ever told appellant that in exchange for something of value she would not turn him in, or if she ever pressured appellant to have sex with her. S.F.'s mother denied doing either. During appellant's case-in-chief, appellant called Craig Owens to the stand and attempted to question him about his knowledge of whether S.F.'s mother had ever solicited sex from appellant in exchange for not turning appellant in. The State objected to this testimony on the basis of relevance. Appellant responded that he was trying to show that S.F's mother was lying and the testimony was admissible because it went to her character and reputation. On appeal, however, appellant asserts the trial court erred in excluding this testimony because it was admissible to impeach the witness and to show her possible bias and motivation to testify falsely.

At trial, appellant sought to introduce a specific instance of conduct for the purpose of impeaching a witness' credibility. As stated above, specific instances of conduct are not admissible for the purpose of attacking credibility. TEX. R. EVID. 608(b). On appeal, appellant asserts that this testimony was admissible to show bias and a motive to testify falsely. This ground of admission was never presented to the trial court. In order to preserve an issue for appellate review, the point of error presented on appeal must comport with the objection advanced at the trial court. *Lape v. State*, 893 S.W.2d 949, 954–55 (Tex.

App.—Houston [14th Dist.] 1994, pet. ref'd) (citations omitted). Therefore, as appellant did not present this ground of admission to the trial court, appellant did not preserve error. *Id.*

Furthermore, appellant did not show what Craig Owens would have testified to if he had been permitted. Generally, a party complaining of the exclusion of evidence must make the substance of the excluded evidence known to the trial court by an offer of proof, unless the substance of the evidence is apparent from the context. TEX. R. EVID. 103(a)(2). When no offer of proof has been made, an error in the exclusion of evidence may not be urged on appeal. *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999), *cert. denied*, 531 U.S. 837 (2000) (citing *Green v. State*, 840 S.W.2d 394, 407 (Tex. Crim. App. 1992)). The record does not reflect that appellant made the substance of the excluded testimony known to the trial court or that it was apparent from the context. Consequently, even if appellant had urged the same ground for admission of this testimony at trial as he does on appeal, appellant still preserved nothing for review because he did not satisfy the Texas Rules of Evidence.

Finally, assuming appellant had preserved error, we cannot say that the trial court abused its discretion in excluding the testimony of Craig Owens. Even if his testimony would have established that S.F.'s mother had a motive to lie, his testimony would not have discredited the complainant's credibility. *See Lape*, 893 S.W.2d at 955 (holding no abuse of discretion to disallow testimony that proved someone other than complainant had made false accusations in the past). Therefore, the trial court could have properly disallowed it. We overrule appellant's first point of error.

III. Voluntariness of Appellant's Confession–Point of Error Two

Appellant asserts the trial court erred by failing to conduct a hearing outside the presence of the jury to determine the voluntariness of appellant's statement.

Article 38.22, section 6, which requires the court to hold a hearing outside the presence of the jury and make an independent fact finding as to the voluntariness of a

statement, becomes operative when the issue of voluntariness is before the court. TEX. CODE CRIM. PRO. ANN. art. 38.22, § 6 (Vernon 1979). A specific request is not necessary; it is enough to object to the voluntariness of a statement. *Sanders v. State*, 715 S.W.2d 771, 775 (Tex. App.—Tyler 1986, no pet.) (citing *McNeill v. State*, 650 S.W.2d 405, 407 (Tex. Crim. App. 1983); *Page v. State*, 614 S.W.2d 819, 821 (Tex. Crim. App. 1981)). However, counsel's objection must be made timely and be sufficient to alert the trial court there is an issue concerning the voluntariness of the statement. *Id*. (stating that if the issue is not timely raised, appellate review is precluded); *see also Villareal v. State*, 811 S.W.2d 212, 217 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (holding that appellant's objection of improper rebuttal was not sufficient to raise the issue of voluntariness).

When an objection is made at trial, it must be specific and set forth the grounds for the objection in order to preserve error for appeal. *Villareal*, 811 S.W.2d at 217. In addition, the point of error presented on appeal must comport with the objection advanced at the trial court. *Little v. State,* 758 S.W.2d 551, 564 (Tex. Crim. App. 1988). Consequently, in order to complain on appeal regarding the admissibility of his confession, appellant must have objected at the trial on the same grounds he now advances: voluntariness. *See id*.

During the State's case-in-chief, Detective Belton testified that he advised appellant of his *Miranda* rights and appellant knowingly, intelligently, and voluntarily waived them. Detective Belton also testified that appellant wrote a statement, reviewed it, and signed it. Appellant took Detective Belton on *voir dire* and asked him whether he told appellant horrible things were going to happen to him if he did not sign the statement. Detective Belton denied making any threats. On its face, appellant's statement shows appellant received the requisite warnings and he knowingly, intelligently, and voluntarily waived his rights. When the State introduced this statement into evidence, appellant objected to its admission as a confession, but stated he had no objection to its admission as a statement. Appellant did not state the grounds for his objection. The trial court inquired if there were

any other objections. Appellant said "no." The trial court overruled appellant's objection and admitted the statement.

During appellant's case-in-chief, appellant testified that Detective Belton told him that he was going to "hunt [appellant] down and take [him] to prison for [twenty-five] years" if he did not sign the statement. Appellant also testified that Detective Belton told him what to write in his statement. At that time, appellant made no further objection regarding the statement's admission into evidence, nor did he request a hearing as to the voluntariness of the statement.

We hold that appellant's objection during the State's case-in-chief was not sufficient to alert the trial court that there was any issue regarding the voluntariness of appellant's statement. Furthermore, even after appellant's testimony, appellant did not request a hearing or object to the statement's admission. When the issue complained about on appeal was never brought to the trial court's attention, nothing is presented for review. *Id.* (citing *Fancher v. State*, 659 S.W.2d 836 (Tex. Crim. App. 1983)). Accordingly, appellant presents nothing for review. Appellant's second point of error is overruled.

IV. Voluntariness of Appellant's Statement–Point of Error Three

Appellant also asserts the trial court erred by admitting his statement into evidence because appellant's uncontroverted testimony that he was forced to sign the statement rendered the statement inadmissible as a matter of law.

The uncontroverted testimony of an accused that a confession was procured through threats and coercive acts renders a confession inadmissible as a matter of law. *Brownlee v. State*, 944 S.W.2d 463, 467 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (citing *Barton v. State*, 605 S.W.2d 607, 607 (Tex. Crim. App. 1980)). The testimony of an officer present at the time of the alleged incident is sufficient to controvert an appellant's contention that the confession was the product of coercion. *Id.* (discussing *Barton*, 605 S.W.2d at 607, which noted the record in that case was not wholly void of controverting evidence because

an officer who was present during the interview, except for a small period of time when he stood outside the door, testified that no threats or coercion were used).

In this case, Detective Belton was the only other person present when appellant gave his statement. Detective Belton testified, contrary to appellant, that he made no threats and did not force appellant to sign the statement. Therefore, appellant's testimony that he was forced to write and sign the statement was controverted. Thus, appellant's statement was not inadmissible as a matter of law. Appellant's third point of error is overruled.

V. Incorrect Parole Law in Jury Charge–Point of Error Four

Appellant asserts the trial court erred when it incorrectly instructed the jury on the law regarding appellant's parole eligibility.

Jury charge error is defined as the disregarding of, or noncompliance with, various statutory provisions. TEX. CODE CRIM. PRO. ANN. art. 36.19 (Vernon 1981). The trial court is required to set forth in the jury charge the law applicable to the case. TEX. CODE CRIM. PRO. ANN. art. 36.14 (Vernon Supp. 2001).

The trial court's jury charge in the punishment phase contained the following instruction regarding the applicable parole law:

> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals *one-fourth* of the sentence imposed.

(emphasis added). The correct applicable law allows appellant to be eligible for parole when the actual time served equals *one-half* of the sentence imposed, regardless of any good conduct time he may earn. TEX. CODE CRIM. PRO. ANN. art. 37.07, § 4 (a) (Vernon Supp. 2001). When asked if he had any objection to the charge, appellant affirmatively stated: "No, Your Honor." On appeal, however, appellant asserts the trial court erred by incorrectly instructing the jury on the applicable parole law.

The State concedes, and we find, the trial court did not set forth in the jury charge the law applicable to this case. Therefore, the trial court did commit error when it presented the erroneous charge to the jury. However, appellant affirmatively stated that he had no objection to the charge. Generally, in order to preserve error, a party must object. TEX. R. APP. P. 3.1(a). There is, however, an exception to this general rule for jury charge error. *See Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985). In *Almanza*, the Court of Criminal Appeals held that if a defendant does not object to charge error, he must show the error was fundamental in order to complain on appeal. *Id*. at 171.

Some courts have distinguished those situations where defense counsel failed to object and situations like these where defense counsel affirmatively stated no objection. *See Reyes v.* State, 934 S.W.2d 819 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Ly v. State*, 943 S.W.2d 218 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd); *Cedillo v. State*, 33 S.W.3d 366, 368 (Tex. App.—Fort Worth 2000, pet. ref'd); *McCray v. State*, 861 S.W.2d 405 (Tex. App.—Dallas 1993, no pet.). These cases hold that an appellant should not be allowed to affirmatively approve the jury charge and then complain about it on appeal. *Reyes*, 934 S.W.2d at 820 (suggesting there might be a strategic reason for counsel to approve the charge at the trial court and then challenge it on appeal). Consequently, under this analysis, affirmatively approving the charge, stating "no objection," waives any harm for the purpose of appeal.

This court, however, in *Webber v. State*, was unpersuaded by the "affirmative approval" argument. 29 S.W.3d 226, 232 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). In *Webber*, this court rejected the argument that a counsel might have a strategic reason for affirmatively approving the charge, but not for failing to object. *Id*. at 233 (citing *Reyes*, 934 S.W.2d at 820). This court also failed to see the difference between failure to object and affirmative approval of the charge in the context of *Almanza*. *Id*. Because of the reasoning set forth in *Webber*, we will treat appellant's affirmative approval the same as a failure to object and analyze this point of error under the standards set forth in *Almanza*.

Because appellant did not object to the jury charge error, we must decide if the charge error was fundamental. Fundamental error is shown by demonstrating the error was so egregious that it affected a substantial right, depriving the accused of a fair trial. *Id*. at 231 (citing *Taylor v. State*, 7 S.W.3d 732, 736 (Tex. App.—Houston [14th Dist.] 1999, no pet.)); *Hughes v. State*, 24 S.W.3d 833, 837 (Tex. Crim. App. 2000). "A substantial right is affected when: (1) the error had a substantial injurious effect or influence in determining the jury's verdict [or punishment assessment]; or (2) leaves one in grave doubt whether it had such an effect." *Espinosa v. State*, 29 S.W.3d 257, 259 (Tex. App.—Houston [14th Dist.] 2000, no pet) (citing *Davis v. State*, 22 S.W.3d 8, 12 (Tex. App.—Houston [14th Dist.] 2000, no pet.)). On the other hand, a substantial right is not affected, if after reviewing the entire record, the appellate court determines that the error did not influence, or had but a slight influence on the jury. *Montez v. State*, 975 S.W.2d 370, 373 (Tex. App.—Dallas 1998, no pet.) (citations omitted).

In considering whether the error resulted in egregious harm, i.e., deprived the accused of a fair and impartial trial, we shall consider (1) the entire charge, (2) the state of the evidence, (3) arguments of counsel, and (4) any other relevant information revealed by the record of the trial as a whole. *Webber*, 29 S.W.3d at 236 (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996); *Taylor*, 7 S.W.3d at 736). The purpose of the review is to find actual harm to the accused, not mere theoretical harm. *Id*.

First, the charge contains an instruction that the jury is not to consider the manner in which the parole law may be applied to this particular defendant. It further states that the jury is not to consider the extent to which good conduct time may be awarded.

Next, we consider the state of the evidence and arguments of counsel, specifically focusing on whether the jury charge error relates to a contested issue. *Id*. (citing *Hutch*, 922 S.W.2d at 173). Because the error in this case was in the punishment charge, in looking at contested issues we will look at: (1) the punishment sought by the State and the appellant in comparison to the punishment assessed by the jury; and (2) any aggravating and

mitigating factors the jury could have considered in assessing punishment. The State pleaded for the jury to consider the defenseless sixty-pound little girl appellant picked to become his victim and return a sentence of fifteen years and one day. Appellant, however, pleaded for probation and argued that appellant was not a danger to society. The jury assessed punishment at five years' confinement in the Texas Department of Criminal Justice.

There was testimony at the punishment phase that S.F. was suffering from migraines, bad stomach aches, loss of appetite, and had become very introverted. In addition, S.F.'s mother testified that S.F. was under the care of a child psychiatrist and was having problems in school. Appellant's mother testified that, if the jury gave her son probation, she would help him all she could. Appellant had one prior misdemeanor driving while intoxicated conviction for which he received probation. He testified that he was able to successfully complete the terms of that probation.

It is impossible to know to what extent the erroneous instruction influenced the jury's punishment assessment. Indeed, the jury was instructed it could consider the existence of the parole law and good conduct time. Although we cannot say five years is an excessive punishment considering the seriousness of the offense and the particular facts of this case, we also cannot say the erroneous instruction did not influence or had but a slight influence on the jury's punishment assessment. A defendant is entitled to be punished upon a correct statement of the law. *Hutch*, 922 S.W.2d at 174 (stating defendant is entitled to be *convicted* upon a correct statement of the law). Here, the erroneous instruction had the effect of informing the jury appellant would be eligible for parole after *fifteen* months, under a five -year sentence, when the correct charge should have stated appellant would be eligible for parole after *thirty* months. To the extent the jury was permitted to consider parole law during the punishment phase, appellant has a valuable right to a jury correctly informed on the law. The jury was misled into believing that appellant was eligible for parole much earlier than the law provided. Therefore, we sustain appellant's fourth point of error, set

aside the sentence, and remand the case for a new punishment hearing. *See Ovalle v. State*, 13 S.W.3d 774, 788 (Tex. Crim. App. 2000).

VI. Ineffective Assistance of Counsel–Appellant's Fifth and Sixth Points of Error

a. Standard of Review

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). The right to counsel necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id.* First, appellant must demonstrate counsel's performance was deficient and not reasonably effective. *Id.* at 688–92. Second, appellant must demonstrate the deficient performance prejudiced the defense. *Id.* at 693. Essentially, appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption, by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *overruled on other grounds by, Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998). Where the record contains no evidence of the reasoning behind

trial counsel's actions, we cannot conclude counsel's performance was deficient. *Jackson*, 877 S.W.2d at 771–72. An appellate court is not required to speculate on the reasons behind trial counsel's actions when confronted with a silent record. *Id*. at 771.

If appellant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland*, 466 U.S. at 691. Appellant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If appellant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id*.

b. Discussion

In his brief, appellant categorizes his trial counsel's alleged errors based on when they occurred during trial: guilt/innocence stage, and punishment stage. Because of our resolution of appellant's fourth point of error, we find it unnecessary to evaluate the alleged errors that occurred during the punishment phase of the trial. Accordingly, we will focus solely on those alleged errors that occurred during the guilt/innocence phase of the trial.

First, appellant contends that trial counsel failed to request a hearing on the voluntariness of appellant's statement. Second, appellant asserts that his trial counsel's voir dire of the jury pool failed to cover several critical issues. Third, appellant argues that trial counsel failed to challenge for cause two members of the jury pool who stated they could not consider the minimum punishment. Both of these venire members were empaneled on appellant's jury. Fourth, appellant contends that his trial counsel should have used peremptory challenges on these two venire members. Fifth, appellant asserts that trial counsel failed to request a curative instruction and move for a mistrial when the prosecutor

made an improper argument to the jury. Finally, appellant states that trial counsel failed to make a bill of exceptions regarding what Craig Owens' testimony would have been.

First, regarding appellant's assertion that his counsel was ineffective for failing to request a hearing as to the voluntariness of his statement, it has been held that counsel's failure to raise the issue of voluntariness regarding a disputed statement cannot be considered trial strategy. *See Sanders*, 715 S.W.2d at 775. However, where appellant has not shown that a *Jackson v. Denno*[1] hearing would have resulted in suppression of the statement, appellant has not shown how he was prejudiced. *Mowbray v. State*, 788 S.W.2d 658, 671 (Tex. App.—Corpus Christi 1990, pet. ref'd). Thus, appellant fails to show ineffective assistance of counsel. *Id*.

There is nothing in the record which suggests appellant's statement would have been suppressed. At a *Jackson v. Denno* hearing, the trial judge is the sole judge of the credibility of the witnesses. *Brownlee*, 944 S.W.2d at 467 (citing *Butler v. State*, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994). In this case, the evidence presented at the hearing would have consisted of the testimony of appellant and Detective Belton. There is nothing in the record which suggests the trial judge would have found appellant more credible than Detective Belton. Therefore, appellant fails to demonstrate ineffective assistance of counsel with regard to this complaint.

As to appellant's remaining assertions, appellant fails to provide this court with any evidence to affirmatively demonstrate the ineffectiveness of his trial counsel. Thus, appellant has not satisfied his burden on appeal to rebut the presumption that counsel's actions were reasonably professional and motivated by sound trial strategy. Because appellant fails to adequately show either deficient performance or prejudice, his fifth and sixth points of error regarding ineffective assistance of counsel are overruled. *McFarland,* 928 S.W.2d at 500.

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[1] 378 U.S. 368 (1964).

VII. Conclusion

We overrule appellant's first, second, third, fifth, and sixth points of error. We sustain appellant's fourth point of error. Accordingly, we affirm the judgment of conviction, but set aside appellant's sentence and remand for a new punishment trial.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 17, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).