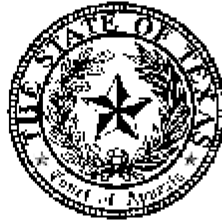
Affirmed and Opinion filed August 3, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00380-CR

TAKEL HAWKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 790,769

O P I N I O N

Over his plea of not guilty, a jury found Takel Hawkins, appellant, guilty of aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). Appellant appeals his conviction on three points of error. We affirm the judgment of the trial court for the following reasons: (1) we find no fundamental error in the jury charge; (2) we find that appellant has waived his sufficiency challenge to the enhancement allegations; and (3) we find that trial court did not abuse its discretion in allowing the State to impeach appellant with his prior felony convictions.

BACKGROUND FACTS

As part of a narcotics investigation, narcotics officers targeted appellant. Undercover officers Allen and Chaison went to appellant's neighborhood to purchase narcotics from appellant. Appellant and a female approached the officers' vehicle, and the officers told appellant that they wanted to buy three hundred dollars worth of crack-cocaine. Appellant told the officers that he needed to pick up the crack-cocaine from a friend, and asked the officers to meet him at a nearby gas station.

The officers met appellant at the gas station, and as appellant was getting into the officers' vehicle, he pulled out a black, semi-automatic pistol, pointed it at the officers, and threatened to "blow their heads off." Chaison gave appellant his money, and appellant pointed the pistol at Allen, who gave him the rest of the money. Appellant got out of the truck, and Allen heard two gunshots. Appellant began to run away as Allen chased after him, yelling for him to stop. Allen shot at appellant several times, and surveillance officers were notified that the drug buy had turned into a robbery of the undercover agents. After being pursued by several other officers, appellant was arrested and charged with aggravated robbery.

DISCUSSION AND HOLDINGS

Error in the Jury Charge

In his first point of error, appellant argues that he is entitled to a new punishment hearing because the trial court submitted an erroneous punishment charge to the jury. Appellant contends that the charge was erroneous because it instructed the jury to consider the punishment range for a habitual offender, with a minimum sentence of twenty-five years. As we discuss below, we find no fundamental error in the jury charge.[1]

Appellant's indictment contained two enhancement paragraphs alleging two prior felony convictions. The second enhancement paragraph incorrectly listed the cause number for the second

---

[1] Although appellant bases his argument on an error in the indictment's enhancement paragraphs, he essentially complains of error in the jury charge. Appellant has waived any error in the indictment by failing to object before trial. *See* TEX. CODE CRIM. PROC. ANN. Art. 1.14(b) (Vernon Supp. 2000)

conviction twice, rather than listing the cause number for the first conviction. The two enhancement paragraphs initially read as follows:

> Before the commission of the offense alleged above, (hereinafter styled the primary offense), on JUNE 29, 1992, in Cause No. 627418, in the 185th District Court of Harris County, Texas, the Defendant was convicted of the felony of Theft.
>
> Before the commission of the primary offense, *and after the conviction in Cause No. 709334 was final*, the Defendant committed the felony of Possession of a Controlled Substance and was finally convicted of that offense on May 8, 1996, in Cause No. 709334, in the 178th District Court of Harris County, Texas.

(emphasis added). The above italicized phrase should have read, "and after the conviction in Cause No. 627418 was final." Upon the State's motion, the italicized phrase was stricken from the indictment. However, appellant contends that because these paragraphs did not allege the proper time sequence for the convictions, the second enhancement paragraph was inoperable, and his sentence should have only been enhanced with one prior conviction. As a result, appellant asserts that the charge was defective because it should have instructed the jury that the minimum sentence it could consider was fifteen years.

To preserve jury charge error on appeal, a party must object to any alleged error within the charge at the time of the trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon Supp. 1999). A defendant waives any error in the charge when he does not object at trial. *See Wilson v. State*, 835 S.W.2d 278, 180-81 (Tex. App.—Beaumont 1992, pet. ref'd). If a party does not properly object, we look at the error in the submission of the charge to determine if it constitutes fundamental error. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)(en banc), *aff'd*, 724 S.W.2d 804 (Tex. Crim. App. 1986). To constitute fundamental error, the error must be so egregious and create such harm that the appellant did not receive a fair and impartial trial. *See id.* at 172. We review the record in light of the entire jury charge to determine the actual, not just theoretical, harm to the appellant. *See id.* at 174.

Appellant did not object to the jury charge. Thus, to obtain a reversal of his conviction, he must show that the error caused him egregious harm. The record makes no such showing. The maximum statutory punishment range for a second time offender is the same as the maximum for a third time offender; each assesses maximum punishment at ninety-nine years. The jury assessed appellant's punishment at

thirty-five years' imprisonment. This punishment was within the permissible range under either statute,[2] and more than the minimum for either type of offender. Therefore, appellant has not demonstrated actual, as opposed to theoretical harm.

Moreover, appellant pleaded "true" to both enhancement allegations. In such a circumstance, we have declined to find fundamental harm. *See Parr v. State*, 864 S.W.2d 132, 137 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (holding that an appellant cannot challenge his enhancement to habitual offender status when he pleaded "true" to the enhancement allegations). Accordingly, we overrule appellant's first point of error.

Sufficiency of the Evidence to Support the Enhancement Allegations

In his second point of error, appellant contends that he is entitled to a new punishment hearing because the evidence was legally and factually insufficient to support the jury's finding of "true" to the enhancement allegations. As we explain below, we hold appellant has waived his sufficiency challenge.

When the State alleges a prior conviction for enhancement purposes, it has the burden of proving that the prior conviction was final. *See Harvey v. State*, 611 S.W.2d 108, 110 (Tex. Crim. App. 1981). However, a defendant removes the burden from the State when he pleads true to an enhancement allegation. *See id.* Moreover, by pleading true, a defendant cannot claim the evidence is insufficient to support an affirmative finding to an enhancement allegation; he waives a challenge to the sufficiency of the evidence challenge on appeal. *See id.*; *Harrison v. State*, 950 S.W.2d 419, 422 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

We hold that appellant's plea of "true" to the enhancement allegations precludes his complaint about the sufficiency of the evidence, and we overrule his second point of error.

Appellant's Impeachment by Prior Convictions

---

[2] The statutory punishment range for a second time habitual offender is a term of not more than ninety-nine years or less than fifteen years, and the range for a third time offender is a term of not more than ninety-nine years and less than twenty-five years. *See* TEX. PEN. CODE ANN. § 12.42(c)(1) & (d) (Vernon Supp. 2000).

In his third point or error, appellant contends that he is entitled to a new trial because the trial court erred in allowing the State to impeach him with prior convictions during the guilt/innocence phase, and in overruling his motion to testify free from impeachment. We disagree.

During trial and out of the presence of the jury, the State asked the trial court for permission to solicit testimony from appellant regarding his prior convictions. Appellant asked for a limiting instruction that the State be prohibited from going into the specific facts of his prior offenses. The trial court overruled appellant's motion, and allowed the State to go into the cause numbers, the dates, the penalties, and the type of appellant's prior offenses. Thereafter, the State impeached appellant with the following prior convictions: (1) a 1992 felony conviction for theft; (2) a 1995 felony conviction for possession of a controlled substance; and (3) a 1998 felony conviction for illegal possession of a prescription form.

The Texas Rules of Evidence provide that felony convictions shall be admissible for impeachment purposes once the trial court decides that the probative value of the conviction outweighs its prejudicial effect. *See* TEX. R. EVID. 609(a). The rules also provide that evidence of the conviction is not admissible if more than ten years have elapsed since the date of the conviction. *See* TEX. R. EVID. 609(b). Among the factors courts consider in weighing the probative value of a conviction against its prejudicial effect are the following: (1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime to the present offense, (3) the similarity between the past crime and the present offense, and (4) the importance of the defendant's testimony and the credibility issue. *See Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992).

The State has the burden to demonstrate, pursuant to rule 609, that the probative value of the conviction outweighs its prejudicial effect. *See id.* In performing this balancing test, the first two factors weigh in favor of admission if the prior crimes were recent, and related to deception, as opposed to violence. *See id.* at 881. Additionally, in cases involving only the defendant's testimony and the testimony of the State's witnesses, a defendant's credibility is important, and courts favor the need to allow the State an opportunity to impeach the defendant's credibility. *See id.*

We review the trial court's weighing of these factors for an abuse of discretion. *See id.* An abuse of discretion occurs when a decision is so clearly wrong and unjust that it "lies outside the zone within which

reasonable persons might disagree." *Sneed v. State*, 955 S.W.2d 451, 453 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd).

Applying rule 609 factors to this case, we conclude that the probative value of appellant's three prior convictions outweighs their prejudicial effect; at least three factors weigh in favor of their admission. First, at least two of appellant's prior convictions - theft and illegal possession of a prescription form - are related to deception as opposed to violence. Second, the convictions were relatively recent, within the rule's statutory ten-year time limitation. Third, appellant's case involved only his testimony and the testimony of the State's witnesses. Therefore, appellant's credibility was important, and the trial court properly afforded the State an opportunity to impeach his credibility.

We conclude that the trial court did not abuse its discretion in allowing the State to impeach appellant with his prior felony convictions. Accordingly, we overrule appellant's third point of error.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 3, 2000.

Panel consists of Justices Yates, Fowler and Edelman.

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