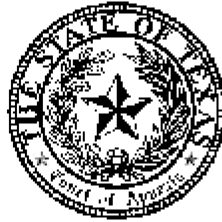
Affirmed and Opinion filed October 5, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00957-CR

FRED PHILLIP WARNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 773,341

O P I N I O N

The State charged Fred Phillip Warner, appellant, with the felony offense of aggravated assault. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). Appellant pleaded not guilty to the charge and the case was tried before a jury. The jury found him guilty. Appellant pleaded true to three enhancement paragraphs and the trial court assessed punishment at confinement in the Texas Department of Criminal Justice, Institutional Division for 35 years. In three points of error, appellant contends that the court improperly considered the enhancement paragraphs in assessing his punishment and failed to conduct an evidentiary hearing on his Motion for New Trial. We affirm the judgment of the trial court.

Background Facts

Because appellant does not challenge the sufficiency of the evidence, only a brief recitation of the facts is needed. Appellant was a salesperson for Ideal Engineering Company. He had several run-ins with Wesley Perkins, his supervisor, over his job performance . Perkins told appellant that his performance was not up to company standards. On the day of the assault, Perkins fired appellant. Perkins followed appellant to appellant's truck to retrieve several of the company's files. When appellant got to his truck, he reached inside, pulled out a gun, and fired one shot into Perkins arm. Perkins ran back into the building and called for help. Appellant was arrested and charged with aggravated assault.

Enhancement Paragraphs

In his first and second points of error, appellant contends that the evidence was insufficient to prove that he was a habitual offender under TEX. PEN. CODE ANN. § 12.42(d) (Vernon 1994); specifically, the State failed to prove that the second and third alleged enhancement convictions were final when the first alleged enhancement judgment was entered. He argues that a new punishment hearing is required because the trial court considered all three convictions in the enhancement paragraphs of the indictment.

The enhancement paragraphs alleged that appellant had committed three robberies on December 13, 1965:

> Before the commission of the offense alleged above on DECEMBER 13, 1965, in Cause No. 117400 in the Criminal District court of Harris County, Texas, the Defendant was convicted of the felony of ROBBERY by ASSAULT.
>
> Before the commission of the offense alleged above on DECEMBER 13, 1965, in Cause No. 117399 in the Criminal District Court of Harris County, Texas, the Defendant was convicted of the felony of ROBBERY by ASSAULT.
>
> Before the commission of the offense alleged above on DECEMBER 13, 1965, in Cause No. 117398 in the Criminal District Court of Harris County, Texas, the Defendant was convicted of the felony of ROBBERY by ASSAULT.

After the jury found him guilty, appellant pleaded true to each of the enhancement paragraphs.

The State contends that it intended to enhance the second degree felony of aggravated assault to a first degree felony under Texas Penal Code Section 12.32(b). The trial court, in fact, entered a nunc pro tunc judgment and sentence reflecting that appellant was convicted of a second degree felony. The State

is permitted to allege more than one prior conviction to authorize enhancement of punishment even though proof of only one conviction is required. *See State v. Delgado*, 825 S.W.2d 744 (Tex. App.–Houston [14th Dist.] 1992, no pet.); *Turner v. State*, 750 S.W.2d 48 (Tex. App.–Fort Worth 1984). The State need only establish the dates the prior convictions became final and that the primary offense occurred subsequently to the prior convictions. In this case, the State met their burden.

Alleging multiple prior convictions, however, can be confusing because it may be unclear whether the State is seeking enhancement by alleging several convictions in the hopes of proving at least one or whether the State is seeking to prove that the defendant comes within the habitual offender statute. The confusion can be resolved by a proper objection from the appellant that forces the State to chose between the two alternatives. Appellant failed to object to the indictment and his waived any error on appeal. *See* TEX. R. APP. P. 33.1.

We hold that the trial court could consider any one of the enhancement paragraphs because the State was seeking to enhance the primary offense, a second degree felony, to a first degree felony under 12.42(b); since appellant's sentence was within the term prescribed for a first degree felony, it was proper. We overrule appellant's first and second points of error

Motion for New Trial

In his third point of error, appellant contends that the trial court erred in failing to conduct an evidentiary hearing on his Motion for New Trial. Appellant timely filed a Motion for New Trial on August 28, 1998. In addition, appellant filed a document entitled "Defendant's Offer of Proof and Request for a Hearing on Motion for New Trial" on October 9, 1998. The motion raised an issue outside of the record alleging that members of the jury panel engaged in improper deliberations. The motion, however, was not supported by an affidavit.

We review a trial court's refusal to hold an evidentiary hearing on a motion for new trial for an abuse of discretion. *See Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App.1993). A trial court abuses its discretion in denying a hearing on a timely filed motion for new trial if the motion raises a matter outside the record upon which relief could be granted. *See Reyes*, 849 S.W.2d at 816. While not

statutorily required, if the motion alleges facts outside the record, it must be supported by the affidavit of someone with knowledge of the facts. *Id*; *Mallet v. State*, 9 S.W.3d 856, 865 (Tex. App.–Fort Worth 2000, no pet. h.); *Oestrick v. State*, 939 S.W.2d 232, 236 (Tex. App.– Austin 1997, pet. ref'd). Because appellant failed to file an affidavit, we find the trial court did not abuse its discretion in failing to hold a hearing on the motion. Appellant's third point of error is overruled.

Having addressed all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed October 5, 2000.

Panel consists of Justices Draughn, Cannon, and Lee.

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