AFFIRMED and Opinion Filed July 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00103-CR

CHARLIE JESUS VICENTE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F-1745411-J

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Bridges

Charlie Jesus Vicente appeals his robbery conviction. The trial court accepted appellant's guilty plea to the charge of robbery, found appellant guilty, and sentenced him to twenty years' confinement. In a single issue, appellant argues the trial court erred in failing to admonish him of the range of punishment of the robbery charge. We affirm the trial court's judgment.

In June 2017, appellant was indicted on a charge of aggravated robbery. At a hearing before the court on December 20, 2018, the trial judge admonished appellant that the offense of aggravated robbery is a first-degree felony with a range of

punishment from five to ninety-nine years or life and fine up to $10,000. Appellant said he understood. The trial judge further admonished appellant that the State alleged he used or exhibited a deadly weapon during the offense and, if that was found to be true, he would have to "do aggravated time on this case," which meant he would have to do half of any sentence that he received before he would be eligible for parole. Appellant said he understood. The trial judge stated it was her understanding that the State and appellant's attorney had "not been able to come to an agreement in terms of a plea bargain," but appellant still wished to plead guilty to the charge and ask the trial court to assess punishment. Appellant said that was his understanding. The trial judge asked if appellant understood that, if she assessed punishment, she could assess punishment "anywhere from five to ninety-nine years or life in the penitentiary but could also place appellant on probation if she found that was appropriate. Appellant said he understood. The trial judge asked if appellant understood that there was "no agreement" with the court, and the judge could do whatever she thought was appropriate. Appellant agreed that was "clear" and he had no questions "about any of that."

Appellant was sworn, and he waived a reading of the indictment and entered a plea of guilty. In response to questioning from the trial judge, appellant testified it was his desire to plead guilty to the charge, and he was doing so freely and voluntarily. Without objection, the State offered appellant's signed written and voluntary judicial confession and stipulation of evidence. The trial judge took

judicial notice of the pre-sentence report and the police report. The State rested its case.

In response to questioning from his attorney, appellant testified he understood that, up until that morning, the State had the intent of presenting a prior felony conviction as part of his plea and was going to "enhance it to a 15-year-to-life penalty range." Appellant agreed the State was allowing him to "go open without that enhancement paragraph or getting [him] to plead true to that," but he understood that "the judge still [knew] about that penitentiary trip." Further, appellant agreed he was asking the judge to put him on probation because he thought he needed "some kind of a drug treatment." Appellant testified he was "using meth and heroin" at the time of the offense. Appellant testified that, during the robbery, he made the person that was robbed believe he had a gun by lifting his shirt and showing a gun; however, the gun was actually a BB gun. When the trial judge inquired of the prosecutor whether appellant had a real gun or a BB gun the prosecutor replied she had "no evidence that that was a BB gun." The State introduced a picture of the gun and stated the police report indicated that the gun was "a black semiautomatic pistol" found in appellant's car. Thus, the State claimed the gun was real, and appellant claimed it was a BB gun. The trial judge accepted appellant's guilty plea but expressly made no deadly weapon finding. The trial judge assessed a sentence of twenty years' confinement and adjourned the proceedings.

That same day, the trial judge went back on the record and said the State agreed that "there was no weapon used, that it was a fake gun." The trial judge asked what was the State's position, and the prosecutor responded:

> Judge, we would reoffer – reurge in agreement with the Defense that this should just be a robbery case with a punishment range of two to 20 years. We have altered the plea bargain paperwork and initialed the documentation to make it a robbery, and we would request the judge assess punishment within that two to 20 realm.

Defense counsel stated he had no objection. The trial judge accepted appellant's plea of guilty to the offense of robbery, sentenced appellant to twenty years' confinement, and asked whether there was "anything else that needs to go on the record." Both the prosecutor and appellant's counsel said there was nothing further. This appeal followed.

In a single issue, appellant argues the trial court erred in failing to admonish him of the range of punishment of the robbery charge when the proceedings were reconvened. Before a trial court can accept a plea of guilty, it must admonish the defendant of the range of punishment attached to the offense. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (West). A trial court's incorrect admonishment substantially complies with article 26.13 when the record shows the sentence given lies within both the actual range of punishment and the misstated range of punishment. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998); *Luckett v. State*, 394 S.W.3d 577, 581 (Tex. App.—Dallas 2012, no pet.). A failure to comply with article 26.13(a) is nonconstitutional error, subject to the harm

analysis of rule 44.2(b) of the Texas Rules of Appellate Procedure. *Aguirre–Mata v. State*, 125 S.W.3d 473, 474 (Tex.Crim.App.2003). We will not reverse unless the record supports an inference that appellant did not know the consequences of his plea. *Luckett*, 394 S.W.3d at 581.

As the prosecutor indicated when the hearing was reconvened, the plea agreement contains a section entitled "COURT'S ADMONITIONS TO DEFENDANT" showing the charge was changed to robbery and the punishment range was changed to "2-20." Appellant was sentenced within the range of punishment for the robbery offense. Accordingly, the trial court's admonishment substantially complied with article 26.13. *See Martinez*, 981 S.W.2d at 197; *Luckett*, 394 S.W.3d at 581.

Further, the record does not support an inference that appellant did not know the consequences of his plea. The trial court initially admonished appellant on the punishment range for the offense of aggravated robbery. Clearly the State and the defense negotiated together to reduce the charge to robbery and came back into court together to bring the matter before the trial judge. In open court, with appellant present, the prosecutor said to the trial judge that the State was "in agreement with the Defense that this should just be a robbery case with a punishment range of two to 20 years." The prosecutor also asked the judge to "assess punishment within that two to 20 realm." Under these circumstances, we conclude appellant cannot show that he was harmed by the trial court's failure to orally re-admonish appellant on the

punishment range for the offense of robbery. *See Luckett*, 394 S.W.3d at 581. We overrule appellant's single issue.

We affirm the trial court's judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHARLIE JESUS VICENTE, Appellant	On Appeal from the Criminal District Court No. 3, Dallas County, Texas Trial Court Cause No. F-1745411-J.
No. 05-19-00103-CR V.	Opinion delivered by Justice Bridges. Justices Molberg and Carlyle participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 17, 2020