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COURT OF CRIMINAL APPEALS
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No. PD-

TO THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
8/23/2018
DEANA WILLIAMSON, CLERK

OF THE STATE OF TEXAS

VITH LOCH, Appellant

v.

THE STATE OF TEXAS Appellee

Appeal from Harris County
No. 01-16-00438-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Vith Loch.

* The trial Judge was the Honorable Michael McSpadden, 209th Judicial District Court.

* Trial counsel for the State were Joseph Allard and Lauren Bryne, 1201 Franklin Street, Suite 600, Houston, Texas 77001.

* Counsel for the State before the Court of Appeals was Jessica Caird, 1201 Franklin Street, Suite 600, Houston, Texas 77001.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant at trial was Sean Payne, 1401 Richmond Avenue, Suite 270, Houston, Texas 77006.

* Counsel for Appellant before the Court of Appeals was Cheri Duncan, 1201 Franklin Street, 13th Floor, Houston, Texas 77002.

INDEX OF AUTHORITIES

Cases

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No. PD-

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

VITH LOCH, Appellant

v.

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Appeal from Harris County
No. 01-16-00438-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Because an illegal immigrant is always subject to deportation, immigration consequences are immaterial to the decision to plead guilty. Therefore, harm or prejudice from counsel's failure to admonish about immigration consequences cannot be shown. That rule should be extended to circumstances in which the trial court failed to admonish, under TEX. CODE CRIM. PROC. art. 26.13(a)(4), a defendant who is already deportable due to a prior conviction.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellant, a citizen of Cambodia, 1 CR 9, pled guilty to murder but was not admonished by the trial court of the immigration consequences of his plea as required by TEX. CODE CRIM. PROC. art. 26.13(a)(4). 1 CR 144. A jury sentenced him to life imprisonment and imposed a $10,000 fine. 1 CR 144. The court of appeals reversed his conviction, holding that the failure to admonish was harmful under TEX. R. APP. P. 44.2(b). *Loch v. State*, No. 01-16-00438-CR, 2018 WL 3625190 (Tex. App.—Houston [1st Dist.] July 31, 2018) (not designated for publication).

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed Appellant's conviction and remanded the case to the trial court. *Loch*, 2018 WL 3625190, at *3. The State's PDR is due by August 30, 2018.

GROUNDS FOR REVIEW

1. **Is the failure to admonish about immigration consequences under TEX. CODE CRIM. PROC. art. 26.13(a)(4) harmful when the defendant was already deportable at the time of his guilty plea due to prior convictions?**

2. **Is the failure to admonish about immigration consequences under TEX. CODE CRIM. PROC. art. 26.13(a)(4) harmful when the defendant knew he was already deportable at the time of his guilty plea due to prior convictions?**

3. **Was the failure to admonish about immigration consequences under TEX. CODE CRIM. PROC. art. 26.13(a)(4) harmful when Appellant was already deportable, the evidence of guilt was overwhelming, and he was morally motivated to plead guilty?**

ARGUMENT

1. Background

In April 2015, Appellant was charged with murder. 1 CR 7. When he appeared before a magistrate, Appellant stated that he is not a U.S. citizen and requested the consulate for his country—Cambodia—be notified. 1 CR 9; 7 RR State's Exhibit 27 at 6 (designating birthplace as Asia).

In May 2016, Appellant pleaded guilty to murdering the victim in 2004. 1 CR 144; 5 RR 9-11. He was not, however, admonished according to TEX. CODE CRIM. PROC. art. 26.13(a)(4) that his plea "may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law[.]"

When pleading guilty, Appellant also stipulated to six prior convictions:

(1) Felony Aggravated Assault with a Deadly Weapon, April 1989, Texas, ten years' imprisonment.

(2) Felony Burglary of a Habitation, March 1990, Texas, twenty years' imprisonment.

(3) Misdemeanor Possession of Marijuana, February 1996, Texas.

(4) Second-Degree Felony Flight with Disregard for Safety to Persons, January 2005, Florida, two years, two months, eight days' imprisonment.

(5) Misdemeanor False Name or Identity to Police, January 2005, Florida, two months and thirteen days' imprisonment.

(6) Third-Degree Felony Neglect of Child, January 2005, Florida, two years, two months, eight days' imprisonment

5 RR 9-11; 7 RR State's Exhibits 26, 27.

Appellant opted to have a jury assess punishment. 1 CR 144-45. After a short punishment trial, the jury sentenced him to life imprisonment and imposed a $10,000 fine. 6 RR 58-59.

2. Court of Appeals

On appeal, Appellant challenged the voluntariness of his guilty plea based on the trial court's failure to admonish him under Article 26.13(a)(4). *Loch*, 2018 WL 3625190, at *2. Conceding that the trial court erred, the State argued that Appellant was not harmed because, presumably, he would have been admonished of such

consequences when he pled guilty to the prior felonies.[1] *Id*. at *3. The court of appeals disagreed, stating that there was no evidence in the record that Appellant had been admonished or otherwise made aware of any possible consequences. *Id*. Lastly, though the court observed that the evidence of guilt "unquestionably favors the State," it opined that it makes no difference because there is no evidence that Appellant knew about deportation consequences. *Id*.

3. Analysis

For purposes of TEX. R. APP. P. 44.2(b), harm for the failure to admonish under Article 26.13(a)(4) is assessed according to the following standard: "Considering the record as a whole, do[es the court] have a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him?" *VanNortrick v. State*, 227 S.W.3d 706, 709 (Tex. Crim. App. 2007). In doing so, the strength of the evidence is considered in determining whether the failure to admonish influenced the guilty plea. *Id*. at 712.

A. Appellant was Already Deportable, So the Possibility of Deportation Could Not Have Impacted His Decision to Plead Guilty.

i. Appellant was Deportable As a Matter of Law Before his Guilty Plea.

This Court can have "fair assurance" that Appellant would have pleaded guilty

[1] Article 26.13(a)(4) does not apply to misdemeanor cases. *State v. Guerrero*, 400 S.W.3d 576 (Tex. Crim. App. 2013).

because he already faced the possibility of deportation before entering his plea. According to Appellant's Florida prison records, which were part of his guilty-plea stipulations, 5 RR 165-66, in December 2005, ICE-Miami issued a detainer. 7 RR State's Exhibit 27 at 7 (12/20/05 Detain ICE-Miami A#025-391-301). The detainer "serve[d] to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and *removing* the alien." 8 C.F.R. § 287.7 (emphasis added). Appellant's deportable status could not have changed from the last known active date of the detainer in December 2015 until the date he pleaded guilty (May 2016). Even assuming that Appellant was a permanent resident alien, his prior "aggravated felony" convictions[2] would have excluded him from cancellation of removal by the Attorney

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[2] "When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA [Immigration Nationality Act], we generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

- *Compare* Texas Assault, applicable here, 7 RR State's Exhibit 27 at 16, in TEX. PENAL CODE § 22.01(3) (*intentionally and knowingly* threatens imminent bodily injury) *and* Aggravated Assault with a Deadly Weapon in 1987 TEX. PENAL CODE § 22.02(a)(2) ("threatens with a deadly weapon, or (a)(4) ("uses a deadly weapon") *with* 8 U.S.C. § 1101 (43)(F) (included in the definition of "aggravated felony" is a "crime of violence," against a person—for which the terms of imprisonment is at least one year—defined in 18 U.S.C. § 16(a): "an offense that has as an element the use, attempted use, or *threatened use of physical force* against the person or property of another"). *See U.S. v. Schaffer*, 818 F.3d 796, 798 (8th Cir. 2016) ("intent to cause fear" "of imminent bodily

General. 8 U.S.C. § 1229b(a)(3); *Moncrieffe*, 569 U.S. at 187 ("The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case."). Likewise, if Appellant was a nonpermanent resident alien,[3] he would have been excluded from cancellation of removal or adjustment of status to alien lawfully admitted for permanent residence because of his prior convictions as well as his conviction for Third-Degree-Felony

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harm or death" in felony domestic assault has an element of "threatened use of physical force" for purposes of the Armed Career Criminal Act); *Ramirez-Barajas v. Sessions*, 877 F.3d 808, 810 (8th Cir. 2017) (adopting the same for "crime of violence" in 18 U.S.C. § 16(a)); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (18 U.S.C. § 16(b)'s residual clause—any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"—is unconstitutionally vague), *overruling Begay v. U.S.*, 553 U.S. 137 (2008) (requiring intentional and knowing, not reckless, conduct for § 16(b)).

Appellant would not have been entitled to the retroactive application of the discretionary waiver provision in effect before 1996 because his sentence was over five years. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 297 (2001).

- *Compare* Texas Burglary of a Habitation in 1989 TEX. PENAL CODE § 30.02(d)(1) (first degree felony) *with* 8 U.S.C. § 1101(43)(G) (burglary offense for which the term of imprisonment is at least one year).

[3] Appellant would not have been eligible for temporary protected status. 8 U.S.C. § 1254a(c)(2)(B)(I) (no eligibility for alien convicted of any felony); *Ex parte Aguilar*, 537 S.W.3d 122, 126 (Tex. Crim. App. 2017).

Child Neglect.[4] 8 U.S.C. § 1229b(b)(1)(C); 8 U.S.C. § 1227(a)(2)(A)(ii) (two or more crimes involving moral turpitude),[5] (iii) (aggravated felony).[6] His priors would also disqualify him from cancellation or removal because they would prevent him from being characterized as "a person of good moral character" for no less than ten years. 8 U.S.C. § 1229b(b)(1)(B).

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[4] *Compare* Third-Degree-Felony Child Neglect under FLA. STAT. § 827.03(1)(e), (2)(d) *with* 8 U.S.C. § 1227(a)(2)(E)(1) ("Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, *child neglect*, or child abandonment is deportable.") (emphasis added); 8 U.S.C. § 1229b(b)(1)(C) (Attorney General may not cancel the removal or adjust the status of an alien who is inadmissible or deportable because he has been convicted of an offense under 8 U.S.C. § 1227(a)(2)).

[5] Those crimes include:

- Aggravated Assault with a Deadly Weapon. *See Calderon-Dominguez v. Mukasey*, 261 Fed.Appx. 671, 673 (5th Cir. 2008) (unpublished) (intentional assault against spouse under TEX. PENAL CODE § 22.01 is a crime of moral turpitude).
- Burglary of a Habitation. *See Pulido-Alatorre v. Holder*, 381 Fed.App'x 355, 358 (5th Cir. 2010) (burglary of a vehicle is a crime of moral turpitude).
- Second-Degree-Felony Flight with Disregard for Safety to Persons. *See Gelin v. U.S. Attorney General*, 837 F.3d 1236, 1241 (11th Cir. 2016) (resisting an officer with violence is a crime of moral turpitude).
- Third-Degree-Felony Neglect of Child under FLA. STAT. § 827.03(1)(e), (2)(d). *Cf. Keungne v. U.S. Attorney General*, 561 F.3d 1281, 1287 (11th Cir. 2009) (even criminally reckless conduct constitutes moral turpitude).

[6] *See* text accompanying note 2 *supra*.

ii. Appellant Was Similarly Situated to an Undocumented Immigrant Who Was Always Deportable or a U.S. Citizen Who Will Never Be Deportable.

Because Appellant was deportable at the time he pled guilty, his status is analogous to the appellee in *State v. Guerrero* and the appellant in *Cain v. State*. 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013); 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). In *Guerrero*, Guerrero claimed that his guilty plea was involuntary because his trial attorney failed to admonish him about deportation consequences. *Id*. This Court observed that "the prospect of removal . . . could not reasonably have affected" Guerrero's decision to plead guilty because, as an undocumented immigrant, he was "deportable for that reason alone[.]"[7] *Id*. at 588-59. "Had [Guerrero] gone to trial with counsel and been acquitted he would not have been transformed into a legal resident." *Id*. at 589.

In *Cain*, Cain claimed that the trial court reversibly erred by failing to admonish

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[7] Given *Guerrero*'s holding, this Court's decision in *Carranza v. State*, has been overruled *sub silentio*. The Court held that Carranza established that the failure to admonish him was harmful even though he was already subject to deportation because of his illegal status. 980 S.W.2d 653, 658 (Tex. Crim. App. 1998). The Court reasoned that there is a significant difference between an illegal alien with an expired permit and one who committed a crime. *Id*. Specifically, the Court pointed out that immigration law in effect had waiver provisions for non-criminal deportees and the newly enacted federal habeas statute did not give federal courts jurisdiction over an order of deportation by the Board of Immigration Appeals. *Id*.

Nevertheless, even if *Carranza* is still good law, this case is different because Appellant already had a criminal history with serious offenses.

him under Article 26.13(a)(4). 947 S.W.3d at 263. This Court held that the error was harmless because the record showed that he was a U.S. citizen and therefore not subject to deportation. *Id*. at 264.

Appellant, like Guerrro and Cain, experienced absolutely no change in his immigration status as a result of his guilty plea.[8]

iii. *VanNortrick v. State* is Not Controlling.

To the extent that *VanNortrick v. State* supports the proposition that the error here was harmful, it should be distinguished or disavowed. 227 S.W.3d at 714. There, the State argued that the inference of U.S. citizenship precluded a finding of harm. *Id*. at 710. According to the State, VanNortrick's prior Michigan felony conviction would have made him deportable had he been a non-U.S.-citizen when he pleaded guilty. *Id*. And because he had freely moved to Texas, it strongly suggested that he was a U.S. citizen. *Id*. This Court determined that the prior Michigan conviction did not prove VanNortrick was a U.S. citizen. *Id*. at 711. "There are too

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[8] *See also Ex parte Velasquez-Hernandez*, No. WR-80,325-01, 2014 WL 5472468, at *4 (Tex. Crim. App. Oct. 15, 2014) (not designated for publication) ("Applicant's attorney may have given him incorrect advice as to a possible cancellation of removal, but based on the evidence we have in the record, applicant is ineligible for cancellation of his removal proceedings for reasons unrelated to his trial counsel's possibly deficient performance: he is in the country illegally, and removal proceedings had begun before his indictment on the charged offense.").

many possible scenarios by which a non-citizen who has been convicted of a deportable offense could have escaped the immigration consequences of his conviction." *Id*. Noting that it would be impossible to know whether the admonishment would have changed VanNortrick's decision to plead guilty, the Court held that it had no fair assurance that the error was harmless. *Id*. at 712-13. Elaborating, the Court stated that it could not determine if the Michigan conviction in any way altered his immigration status. *Id*. at 713. But, even if VanNortrick had been aware of the consequences then, "would he not be reasonable to believe that, having gone this long without being deported, he would likely never have been deported for that conviction? And that the conviction in the present case presented a renewed risk to his status?" *Id*. at 713-14.

VanNortrick is not controlling here. First, the issue was whether the Michigan prior supported a finding that VanNortrick was a U.S. citizen, thereby rendering any error harmless. There is no question that Appellant is a citizen of Cambodia, so there is no argument that U.S. citizenship defeats a showing of harm.

Next, how Appellant's priors impacted his status is ascertainable. *See* 3.A.1. *supra*. It is a matter of statutory law. Therefore, unlike *VanNortrick*, the data is not insufficient to assess harm. 227 S.W.3d at 714.

Third, VanNortrick's statement that a "renewed risk" of deportation renders the

error harmful is dicta. The Court's resolution of the case was based on the silent or insufficient record about VanNortrick's citizenship. Whether the prior conviction altered his immigration status was besides the point. But, even if the Court's "renewed risk" discussion carries any weight, it has been significantly undermined by the Court's more recent decision in *Guerrero*. And for good reason. The requisite admonishment warns that a guilty plea "*may* result in deportation, ..." TEX. CODE CRIM. PROC. art. 26.13(a)(4). "May" connotes a possibility, which is contrary to *VanNortrick*'s assumption that it conveys something more definite or imminent. A "renewed risk" is a fiction when there was a pre-existing risk that the defendant "may" be deported.

iv. Conclusion: Pre-Existing Deportability Makes the Error Harmless.

a. Appellant was Already Deportable.

The Court of Appeals failed to recognize Appellant's immigration status was immaterial to his plea. Because Appellant had no lawful right to remain in the U.S., he is not entitled to complain that his guilty plea to murder might lead to his deportation. Regardless of Appellant's actual awareness of his status, the reality is that the admonishment—that he "may" suffer immigration consequences—was inconsequential. His deportable status could never have been altered by his guilty plea. Therefore, even if Appellant subjectively believed his immigration status was

not already deportable, it still cannot be said that he was harmed by the lack of admonishment. A non-citizen defendant's false belief about immigration status does not implicate a "substantial right" as required by Rule 44.2(b). If it *could* have had no impact on his decision then, in hindsight for purposes of a harm assessment, it cannot rationally be said that it *would* have had an impact. So, like the appellee in *Guerrero*, had Appellant never been charged or gone to trial and been acquitted, he would not have been transformed into a non- deportable or excludable alien.

b. Appellant Knew He was Already Deportable.

According to Appellant's stipulations when pleading guilty, he was aware that an ICE detainer had been issued when he was a prisoner in Florida. 5 RR 165-66; 7 RR State's Exhibit 27 at 7. And, as discussed above, because of his criminal history his status could not have changed. Therefore, Appellant knew he was deportable at the time of his plea and, as such, he already knew he "may" be deported, excluded, or denied naturalization at anytime in the future. *See* TEX. CODE CRIM. PROC. art. 26.13(a)(4). This Court should grant review to further extend *Guerrero*'s rationale and make clear to lower courts that there can be no reversible error under these circumstances. The legal fiction adopted by the court of appeals unjustly enriches the Appellant and prejudices the State.

v. Evidence of Guilt was Overwhelming, and Appellant was Motivated to Plead Guilty Despite the Lack of Admonishment.

Overwhelming evidence of Appellant's guilt also establishes that Appellant's decision was not affected by the lack of admonishment. *See Loch*, 2018 WL 3625190, at *3 ("This evidence unquestionably favors the State."). Additionally, Appellant decided to plead guilty even though his counsel informed him that he had filed suppression motions and that there were legitimate defensive strategies available if he chose to contest his guilt. 2 RR 7-8. But, importantly, the record shows that Appellant decided to accept responsibility for the murder because he wanted to give the victim's family closure, and had, in the years since the crime in 2004, given "his life to Christ" and reformed his behavior. 5 RR 169-72; State's Exhibit 16 (confession made to police to give family closure). "He pled guilty because he believes he's guilty. He says I'm guilty. I did it." 6 RR 14 (defense summation). Appellant's chosen strategy, then, was to present mitigating evidence to persuade the jury to impose a lighter punishment. 6 RR 14 ("The issue of this is not whether he's guilty or not. The issue is what should happen. What should be the appropriate level of punishment."); *see, generally*, 6 RR 13-34 (defense summation). Consistent with that, in closing counsel argued:

> Did he change or was he not changed and you have to make that decision for yourself. And if you think, believe he's changed then you know what we are asking for, something on the low end. And specifically ladies and

> gentlemen, we are asking for something less than 20, but not more than 20. Because at 20 or less, he'll be between 60 and 65 years old. A 65 year old man who gave his life to Christ is not a threat.

6 RR 31.

The state of the evidence and the dutiful and spiritual motive behind his guilty plea, in combination with his already deportable status, demonstrate that his decision to plead guilty would not have changed had he been properly admonished.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant review and reverse the decision of the court of appeals and remand for consideration of Appellant's remaining points of error.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 4,461 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on August 21, 2018, *via* email or certified electronic service provider to:

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APPENDIX

(Court of Appeals' Opinion)

2018 WL 3625190
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do not publish. TEX. R. APP. P. 47.2(b).
Court of Appeals of Texas, Houston (1st Dist.).

Vith LOCH, Appellant
v.
The STATE of Texas, Appellee

NO. 01-16-00438-CR
|
Opinion issued July 31, 2018

On Appeal from the 209th District Court, Harris County, Texas, Trial Court Case No. 1463146

Attorneys and Law Firms

The Honorable Kim K. Ogg, Jessica A. Caird, for Appellee.

Cheri Duncan, for Appellant.

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.

MEMORANDUM OPINION

Terry Jennings, Justice

***1** After appellant, Vith Loch, without an agreed punishment recommendation from the State, pleaded guilty to the offense of murder, [1] a jury found him guilty of murder and assessed his punishment at confinement for life and a $10,000.00 fine. In three issues, appellant contends that the trial court erred in not admonishing him of the potential immigration consequences of his guilty plea, the trial court erred in not making certain findings before accepting his guilty plea, [2] and, as a result, he entered his guilty plea involuntarily. In its sole cross-point, the State requests reformation of clerical errors in the judgment.

1 *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 2011).

2 *See* TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 2017).

We reverse and remand.

Background

At his arraignment, the trial court advised appellant as to the range of punishment for the offense of murder, but it did not provide any further admonitions. Appellant testified that he discussed his case at length with his trial counsel, including all potential defensive theories and strategies. However, despite his trial counsel's presentation of various possible defensive strategies, appellant chose to plead guilty to committing the 2004 murder of Soeuth Nay, the "complainant," and for a jury to assess his punishment.

During the trial on the issue of punishment, Tavey Mao, the complainant's cousin, testified that he saw appellant threaten the complainant with a firearm near the time of his murder.

N.M. testified that she thought highly of the complainant and that her family had hoped she would marry him when she was older. However, she feared appellant, explaining that when she was twelve years old, he kissed her against her will while she babysat his son. And after the complainant's disappearance in 2004, when N.M. was fourteen years old, appellant called to tell her that the complainant "was gone." Shortly thereafter, N.M. ran into appellant. He offered to buy her a soft drink, and she got into his car because she was afraid to refuse his offer. Appellant then drove her to a motel where he sexually assaulted her.

N.H., appellant's former "girlfriend" and the mother of two of his children, testified that they began a "relationship" when she was fifteen years old and he was much older. During their on-and-off relationship, which lasted for six or seven years, he was violent towards her and would point a firearm at her when he was angry. Appellant even fired a shot at her one time while she was pregnant. In 2004, on the night of the complainant's murder, appellant insisted that N.H. go to work even though she was not scheduled to do so. Later that evening,

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when she telephoned him after her shift for a ride home, he did not answer, despite attempting to reach him numerous times. N.H. took a cab home and discovered that appellant had left their two young children home alone. When he arrived home later that night, he went straight to the bathroom to wash his hands and clothing. N.H. explained that she and her children subsequently fled with appellant to live with his mother in Alvin, Texas. Less than a month later, appellant moved to Florida. He later admitted to N.H. that he had shot and killed the complainant.

***2** M.S., who had been in a "relationship" with appellant before N.H., and is the mother of two of his children, testified that she met appellant when she was thirteen years old and he was approximately twenty-three years old. She explained that he was violent. Appellant knocked her unconscious around the time she returned home from the hospital after giving birth to their second son. After they broke up, appellant showed up at her home late one night in 2004. He was nervous and told M.S. that law enforcement officers were looking for him. Appellant asked to stay with her, but she refused. Two years later, he admitted to M.S. during a telephone call that he had killed the complainant.

The trial court admitted into evidence a stipulation in which appellant stated that he had been previously convicted of six additional felonies: three in Texas and three in Florida. The trial court also admitted into evidence a statement made by appellant to law enforcement officers at the time of his arrest. In that statement, he admitted to having killed the complainant.

Plea Admonitions

In his first issue, appellant argues that the trial court erred in not admonishing him of the immigration consequences of his guilty plea. Although the State concedes that the trial court so erred, it asserts that the error was harmless.

To ensure that trial courts enter and accept only constitutionally valid pleas and to assist trial courts in making the determination that a defendant's relinquishment of rights is made knowingly and voluntarily, Texas law requires that trial courts make certain admonishments to defendants before accepting a plea of guilty. TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Vernon Supp. 2017). And a trial court is explicitly required to admonish the defendant of, among other things, the fact "that if [he] is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." *Id.* art. 26.13(a)(4).

Here, the record demonstrates, and the State concedes, that the trial court did not admonish appellant of the immigration consequences of his guilty plea. Therefore, the trial court committed error. *See VanNortrick v. State*, 227 S.W.3d 706, 708 (Tex. Crim. App. 2007). However, because the error is non-constitutional, if it did not affect appellant's substantial rights, we must hold it to be harmless. *See* TEX. R. APP. P. 44.2(b).

In order to determine whether appellant's substantial rights were affected, we must review the entire record. *Anderson v. State*, 182 S.W.3d 914, 918–19 (Tex. Crim. App. 2006). There is no burden on either party to prove harm or harmlessness resulting from the error. *VanNortrick*, 227 S.W.3d at 709. While we may draw reasonable inferences from the record, we may not use mere supposition. *Id.* at 710–11. In order to determine whether the error was harmless, we must decide whether we have fair assurance that appellant's decision to plead guilty would not have changed had the trial court properly admonished him of the potential immigration consequences of his guilty plea. *Id.* at 709. In conducting this review, we focus on three issues: (1) whether appellant knew the consequences of his plea, (2) the strength of the evidence of his guilt, and (3) his citizenship and immigration status. *Id.* at 712–13.

First, we consider whether appellant was aware of the deportation consequences of his guilty plea. *VanNortrick*, 227 S.W.3d at 712; *see also Gutierrez-Gomez v. State*, 321 S.W.3d 679, 683–84 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding error in not admonishing defendant of immigration consequences harmless where issue referenced five times during voir dire). In this case, the record demonstrates that the trial court did not admonish appellant of any deportation consequences of his guilty plea, and no one made any reference on the record to deportation or other potential immigration consequences that might result from his guilty plea. "[W]hen the record is silent regarding the consequences

of conviction in the context of a guilty plea, we infer that the defendant did not know the consequences of his plea." *VanNortrick*, 227 S.W.3d at 710–11.

***3** The State argues that appellant must have been aware of the immigration consequences of his guilty plea because he would have presumably been admonished when pleading guilty in any one of his six prior felony cases in Texas and Florida.[3] It further notes that a Texas "pen packet" for one of his prior convictions states "possible DETN from USI for Immigration Violation." However, there is no evidence in the record that establishes that appellant actually received an admonishment in any of those cases or was otherwise made aware of the immigration consequences of his plea. *See VanNortrick*, 227 S.W.3d at 711 (holding "pen packet documenting [defendant]'s prior conviction qualifying as a deportable felony conviction" insufficient to support inference defendant non-citizen). And we note that the records in the cases relied upon by the State in support of its position contain direct references to the immigration consequences of pleading guilty, supporting the inference that those defendants had knowledge of the consequences of their pleas. *See Rodriguez v. State*, 425 S.W.3d 655, 665–67 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding harmless error in not admonishing defendant who had twice been previously deported after pleading guilty, admitted discussing consequences of plea with attorney, and discussed marrying citizen with prior counsel to stay in country); *Gutierrez-Gomez*, 321 S.W.3d at 683–84 (holding trial judge's statement, during voir dire, defendant likely automatically deported if released on community supervision, along with references to deportation by defense counsel and prospective juror, supported inference defendant knew consequences of plea). Conversely, in this case, "[d]rawing any sort of reasonable inference from the record before us is no more than mere supposition, which cannot support what the State suggests." *VanNortrick*, 227 S.W.3d at 711.

3 The State asserts that, at the time, Florida law required a similar admonition.

Next, we consider the strength of the evidence of appellant's guilt. This evidence unquestionably favors the State. Both N.H. and M.S. testified that appellant admitted to them that he had killed the complainant. N.M. also testified that after the complainant's disappearance, appellant telephoned her and told her that the complainant "was gone." Additionally, Tavey Mao testified that he saw appellant threaten the complainant with a firearm around the time of his disappearance.

However, the Texas Court of Criminal Appeals has made it clear that where we cannot infer that appellant knew about the immigration consequences of his plea, "the strength or weakness of the evidence against [him] makes little difference to the harm analysis in the context of the whole record." *Id.* at 713. This is because we cannot be certain that, even if the evidence of guilt against him is strong, appellant would necessarily have chosen to enter a guilty plea and accept conviction over taking his chances at trial knowing that is the only way he could have attempted to avoid deportation or being forever denied the opportunity to become a naturalized citizen. *Id.*

Finally, it is undisputed in this case that appellant is not a United States citizen.

Although the evidence of appellant's guilt is strong, there is no evidence in the record from which we can infer that he had knowledge of the immigration consequences of his guilty plea. Thus, we cannot have fair assurance that his decision to plead guilty would not have changed had the trial court admonished him of the possible deportation consequences of his guilty plea. Accordingly, we hold that the trial court's error in not admonishing appellant of the immigration consequences of his guilty plea was not harmless.

We sustain appellant's first issue. Because we sustain appellant's first issue, we need not reach his second or third issues. We also need not address the State's cross-point requesting modification of the judgment for clerical errors.

Conclusion

We reverse the judgment of the trial court and remand the case to the trial court for further proceedings consistent with this opinion.

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