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COURT OF CRIMINAL APPEALS
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No. PD-_____

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COURT OF CRIMINAL APPEALS
12/7/2018
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

HAROLD WAYNE HOLOMAN, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Anderson County
No. 12-17-00364-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, Harold Wayne Holoman.

- The trial judge was Hon. Pam Fletcher, 349th Judicial District Court, Anderson County Courthouse, 500 N. Church Street, Rm. 30, Palestine, Texas 75801.

- Counsel for Appellant at trial was Scott Nicholson, 901 N. Perry Street, Palestine, Texas 75801.

- Counsel for Appellant on appeal was Wm. M. House, Jr., 800 N. Church Street, Palestine, Texas 75801.

- Counsel for the State at trial were Scott Holden, Brenda Hicks, and Sanju Cherian, Assistant District Attorneys, 500 N. Church Street, Rm. 37, Palestine, Texas 75801.

- Counsel for the State before the Court of Appeals was Scott Holden, First Assistant District Attorney, 500 N. Church Street, Rm. 37, Palestine, Texas 75801.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

HAROLD WAYNE HOLOMAN, Appellant

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THE STATE OF TEXAS, Appellee

Appeal from Anderson County
No. 12-17-00364-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

Ordinarily, the recidivist family-violence enhancement is a guilt-phase issue because it is jurisdictional—that is, it must be alleged to vest jurisdiction in the district court. The court of appeals held that this jurisdictional quality was immutable, and thus the State had to prove the prior at guilt. This was error because

the State was not alleging it for a jurisdictional purpose. It alleged the prior for enhancement in a separate notice outside its indictment for a related felony. The State then properly complied with Article 36.01 by waiting until the penalty phase to introduce a potentially prejudicial prior since it was not an element of the offense—in the usual sense or jurisdictionally. Review should be granted to clarify that prosecutors can choose how to use the prior conviction and that choice determines whether it is a guilt or punishment issue.

STATEMENT REGARDING ORAL ARGUMENT

The State believes that a close look at the applicable statutes will likely resolve the issue presented, and thus the State does not request argument.

STATUTES AT ISSUE

This case involves two subsections of TEX. PENAL CODE § 22.01 that raise misdemeanor assault to a third-degree felony. Misdemeanor assault by causing bodily injury is a lesser-included offense for both subsections. They also share an additional element: the victim has a family, household, or dating connection to the defendant. They differ in that one requires proof of a prior family-violence conviction—§ 22.01(b)(2)(A)—and the other requires proof of occlusion—(b)(2)(B). In fuller form:

§ 22.01 ASSAULT

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

. . . .

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

. . . .

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

(A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or

(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth[.][1]

STATEMENT OF THE CASE

Appellant was indicted for felony assault by occlusion under § 22.01(b)(2)(B).[2] The State also alleged prior family-violence convictions in a

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[1] TEX. PENAL CODE § 22.01(a),(b).

[2] CR 6.

separate enhancement notice.[3] At Appellant's jury trial, the trial court submitted (at the State's request and over the defense's objection) the lesser-included offense of misdemeanor assault.[4] This lesser also required the State to prove the victim's status as a household member.[5] The jury convicted Appellant of this lesser.[6] Appellant went to the judge for punishment. The State offered Appellant's family-violence prior as an enhancement to elevate the offense to a third-degree-felony under § 22.01(b)(2)(A).[7] It further enhanced the sentencing range with two additional, sequential felony convictions under TEX. PENAL CODE § 12.42(d).[8] Appellant was

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[3] CR 25.

[4] 3 RR 40-41 (jury charge conference); 3 RR 54-55 (jury charge).

[5] The trial court's charge called the offense "assault causing bodily injury-family violence," and the court of appeals referred to it as "assault family violence." Strictly speaking, there is no separate offense that requires all the elements that the jury found. Misdemeanor assault coupled with a family-violence finding under TEX. CODE CRIM. PROC. art. 42.013 is sometimes called "assault family violence," but the additional facts necessary to establish "family violence" are slightly different—see TEX. FAM. CODE § 71.004—and it is an issue for the judge. *Butler v. State*, 189 S.W.3d 299, 302 (Tex. Crim. App. 2006).

[6] 3 RR 42.

[7] 5 RR 16, 18-19, 20-21.

[8] 5 RR 16, 19, 20-21.

sentenced to 25 years' confinement.[9]

On appeal, Appellant argued that the prior used under § 22.01(b)(2)(A) was an element of that felony offense and since the State failed to prove it at the guilt phase, he was convicted of only a misdemeanor, rendering his 25-year prison term an illegal sentence. The court of appeals agreed.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reformed the judgment to reflect a conviction for "Class A misdemeanor assault family violence" and remanded for a new punishment hearing.[10] The State filed a motion for rehearing on August 30, 2018. The court of appeals overruled the motion and reiterated its original disposition in a substitute opinion.[11] The State submits alongside this petition its motion for extension of time, well within 15 days of the last day for filing its petition. TEX. R. APP. P. 68.2(c).

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[9] 5 RR 28.

[10] *Holoman v. State*, No. 12-17-00364-CR, 2018 WL 3748691 (Tex. App.—Tyler Aug. 8, 2018).

[11] *Holoman v. State*, No. 12-17-00364-CR, 2018 WL 5797241, at *4 (Tex. App.—Tyler Nov. 5, 2018) (not designated for publication).

GROUND FOR REVIEW

Is a prior conviction for family violence under TEX. PENAL CODE § 22.01(b)(2)(A) always a guilt issue simply because it can be, and often is, used as a jurisdictional element?

ARGUMENT

Background

The State's primary attempt to secure a third-degree-felony conviction was through a prosecution for assault by occlusion. The testimony supported this charging decision.[12]

Appellant also had prior family-violence convictions, but the State did not pursue a third-degree-felony prosecution by that route. In contrast to the jurisdictional function of the occlusion allegation, the State alleged the prior conviction for enhancement. Then, after the jury rejected occlusion, the State used the prior to elevate the lesser-included misdemeanor offense back to a third-degree

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[12] Appellant and the victim's mother were in a relationship, and the adult victim was living in the couple's household. One night, they had an argument, and the victim intervened. 3 RR 26. Appellant came toward her, she fell backward, and he got on top of her and started choking her. 3 RR 26-28. The 911 operator agreed the victim had a hard time catching her breath. 2 RR 93. Police photos of the victim's throat showed marks that appeared to be made by hands wrapped around her neck. 2 RR 103.

felony.

On appeal, Appellant argued that the prior was a guilt issue. He contended that, without such guilt-stage proof, the evidence was insufficient for a felony conviction under (b)(2)(A) and his 25-year sentence was illegal. The court of appeals agreed with his premise and found his sentence was illegal. It observed that in *Oliva v. State*, "the jurisdictional nature of the two prior convictions for felony DWI converted them from punishment issues to elements of the offense."[13]

The State argued in its motion for rehearing that the prior was not jurisdictional in this case because the occlusion-assault allegation vested jurisdiction in the district court. The court of appeals, however, held it "axiomatic" that an aggravating fact must either be an element of the offense or an enhancement issue for punishment—it could not be both.[14] Having failed to prove the element at guilt, the State was left with a conviction for Class A misdemeanor assault family violence. The court of appeals modified the judgment and remanded for a new punishment hearing.

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[13] *Holoman*, 2018 WL 5797241, at *3 (citing *Oliva v. State*, 548 S.W.3d 518, 533 (Tex. Crim. App. 2018)).

[14] *Id*.

The court of appeals was right that the prior conviction is ordinarily a guilt issue.

Section 22.01(b)(2)(A) should be treated as a guilt issue when it is alleged as a jurisdictional fact in an indictment. This Court has repeatedly treated such prior conviction allegations as if they were elements.[15] As early as 1969, the Court explained in *Leal v. State* that when the State alleges prior convictions to charge a felony but fails to prove or submit at the guilt phase the number of priors necessary to constitute a felony, the consequence is that, while the district court still has jurisdiction over any lesser included base offense (in *Leal*, shoplifting), the case is no longer a felony.[16] In various cases spanning the decades thereafter, the prior convictions alleged in felony DWI and theft indictments have been consistently treated as if they were elements.[17] They must even be set out in the jury charge like

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[15] On occasion, the Court acknowledges that while it treats allegations of jurisdictional facts as elements, they are not actually elements in the usual sense. *See Cheney v. State*, 755 S.W.2d 123, 128 (Tex. Crim. App. 1988) ("'Value' under Section 31.03, supra, [theft] is more properly conceptualized as a jurisdictional element rather than an element of the offense itself."). More recently in *Oliva*, the Court stated that an aggravating fact that otherwise would be a punishment issue could become an element because it was jurisdictional. 548 S.W.3d at 533.

[16] 445 S.W.2d 750, 752 (Tex. Crim. App. 1969).

[17] *See Diamond v. State*, 530 S.W.2d 586, 587 (Tex. Crim. App. 1975) ("the prior theft convictions in the instant case created a new offense of the grade of felony and vested the District Court with jurisdiction."); *Gibson v. State*, 995 S.W.2d 693, 696

other elements. In *Gant*, the trial court's guilt charge asked for a verdict on all the elements of theft and then submitted Gant's prior conviction as a special issue (within the same charge) to be decided only in case they found Gant guilty of theft.[18] This Court held it was error not to include the prior conviction issue within the main charge. While the error was ultimately harmless, the Court noted that a "not true" finding on the special issue would constitute an acquittal for the offense as a whole.[19]

Article 36.01 stands as authority for treating facts alleged for jurisdiction as elements.[20] It provides:

(Tex. Crim. App. 1999) ("[t]he prior intoxication-related offenses are elements of the offense of felony driving while intoxicated. They define the offense as a felony and are admitted into evidence as part of the State's proof of its case-in-chief during the guilt-innocence stage of the trial."); *Martin v. State*, 200 S.W.3d 635, 639 (Tex. Crim. App. 2006) (requiring that the jury in a felony DWI trial be charged on all the elements of the offense, including jurisdictional elements).

[18] *Gant v. State*, 606 S.W.2d 867, 871 (Tex. Crim. App. 1980) (prior theft convictions are jurisdictional elements of the alleged felony and must be included in the body of the main charge).

[19] *Id*. at 872 n.10.

[20] *Ex parte Benson*, 459 S.W.3d 67, 87-88 (Tex. Crim. App. 2015) ("The 'jurisdictional' exception in Article 36.01 appears to be a tacit recognition that prior convictions that raise an offense to felony status are to be treated as elements."); *see also Gant*, 606 S.W.2d at 871 n.9 (Tex. Crim. App. 1980) ("a coincidental reading of Article 36.01(1) and Article 37.07, § 2(a) . . . convinces us that the [prior conviction enhancement provision for felony theft] . . . must therefore be both alleged and charged as such before the jury is authorized to render a general verdict

> When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.[21]

This provision authorizes the reading of jurisdictional priors as part of the indictment, and, as *Tamez v. State* explained, "this action implicitly authorizes the proof of the previous convictions in the State's case-in-chief."[22] Given this lengthy history, the State agrees that when it alleges a prior family-violence conviction to charge the defendant with a felony under § 22.01(b)(2)(A), it must be proven at guilt.[23]

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of guilt."); *Hathorne v. State*, 459 S.W.2d 826, 830 (Tex. Crim. App. 1970) ("when a prior conviction or convictions are alleged for enhancement of punishment only and are not jurisdictional, that portion of the indictment or information is not read until the second or penalty state of the trial and the proof thereof is not properly offered until then.").

[21] TEX. CODE CRIM. PROC. art. 36.01(a)(1).

[22] 11 S.W.3d 198, 202 (Tex. Crim. App. 2000).

[23] The court of appeals cites a split among other courts on this issue, but only one court has said (b)(2)(A) is a penalty-phase issue in a case where it was used to vest jurisdiction in a felony court. *See State v. Cagle*, 77 S.W.3d 344, 347 n.2 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Although not always well-reasoned, the remaining published cases have held it is a guilt-phase issue, but none have considered whether it remains so when not alleged for jurisdictional purposes. *Reyes v. State*, 314 S.W.3d 74, 81 (Tex. App.—San Antonio 2010, no pet.) (relying on *Calton v. State*, 176 S.W.3d 231 (Tex. Crim. App. 2005), even though that case did

The State did not allege the prior for jurisdiction—only for enhancement.

The prior conviction in this case warrants different treatment because it met both requirements of Art. 36.01—it was "alleged for purposes of enhancement only"[24] and it was "not jurisdictional" because it was not alleged to vest jurisdiction in the district court.[25]

The court of appeals held that an aggravating fact must either be an element of the offense or an enhancement issue for punishment—it could not vary depending

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not involve a jurisdictional prior); *Luna v. State*, 402 S.W.3d 849, 851 (Tex. App.—Amarillo 2013, no pet.) (same); *Wingfield v. State*, 481 S.W.3d 376, 379 (Tex. App.—Amarillo 2015, pet. ref'd) (essential element of felony offense).

[24] This cannot reasonably be questioned. Section 22.01(b)(2)(A) is an enhancement provision, not a definition of elements of a free-standing offense. It is not a separately titled offense or introduced by the words "A person commits an offense if . . . ." Its structure—"[a]n offense under Subsection (a)(1) . . . is a felony of the third degree if"—suggests it merely enhances an already fully defined offense. In the typical case (where it is alleged to secure a felony indictment or felony count within an indictment) the enhancement is a guilt-phase issue only because it is jurisdictional. *See Oliva*, 548 S.W.3d at 533.

[25] *Oliva*, 548 S.W.3d at 533 (jurisdictional priors "raise the level of the offense from a misdemeanor to a felony, which in turn results in vesting jurisdiction of the offense in district court—a court that generally lacks jurisdiction over misdemeanors."). Reading "jurisdictional" as referring to priors that have been alleged to vest jurisdiction in the district court is the most natural reading of Art. 36.01. It is strained to read it, as the court of appeals may have done, to refer to an enhancement provision that functions in the abstract to raise a misdemeanor to a felony.

on its function in a particular case.[26] But Article 36.01 is phrased in terms of what the prior conviction is alleged for: "When prior convictions are alleged for purposes of enhancement only and are not jurisdictional . . . ."

The court of appeals's rule—that an enhancement is forever in one camp or the other—could perhaps be easier for practitioners to implement and remember. But it is not in keeping with the larger purpose of Art. 36.01 as explained in *Oliva*:

> Before the enactment of Article 36.01, this Court upheld the practice of allowing prior convictions alleged in the charging instrument to be read to the jury before it decided the issue of guilt. The legislature's obvious purpose in changing that practice was the "prevention of the extreme prejudice which would inevitably result" in announcing the prior convictions before guilt had been decided.[27]

If Appellant and the court of appeals had their way (*i.e.*, the prior is always a jurisdictional element), then when the State has two avenues of prosecuting a felony (one with a prior and one without) it will simply prosecute both and the defense will

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[26] *Holoman*, 2018 WL 5797241, at *3.

[27] *Oliva*, 548 S.W.3d at 529 (citations omitted). This same concern appeared to have dissuaded the prosecutor from offering the prior at the guilt phase. 2 RR 30 (prosecutor explaining in *voir dire* how he wrongly accused his daughter of eating an entire bag of cookies because she had done it before and stating, "So you can't put [sic] a person's criminal history against them during the guilt/innocence phase of trial.")

suffer the prejudice of the jury learning about the prior offense on the other case. Under the State's interpretation, it can undercharge (as in this case) and the jury's focus at guilt can be unperturbed by the presence of a prior.

The court of appeals was right to one extent. If the State had charged both (b)(2)(A) and (b)(2)(B) as jurisdictional felonies in its indictment and the jury had found Appellant guilty of the lesser-included offense of assault, the State would not, in the same case, be able to reuse (b)(2)(A) as a punishment-phase enhancement. What the State advocates for here is little different than permitting the State to use a prior conviction either to establish an offense element for felon-in-possession or to enhance sentence at punishment, but not both in the same case.[28] The State should be permitted to do so.

A word about harm. Error in submitting an issue at the wrong phase of trial can frequently be harmless, particularly when the same factfinder has decided the issue. But here, if the prior must always be established at guilt, it would be error to submit it at the guilt phase on this indictment because the prior would add an element

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[28] *Wisdom v. State*, 708 S.W.2d 840, 845 (Tex. Crim. App. 1986) ("The use of a prior conviction to prove an essential element of an offense bars the subsequent use of that prior conviction in the same indictment for enhancement purposes.").

that is not within the allegation of assault by occlusion and thus is not a lesser-included offense.[29]

The allegations for occlusion assault under subsection (b)(2)(B) vested jurisdiction in the district court over that offense and any lesser included offenses.[30] The State's allegation of the prior conviction, by contrast, was for enhancement purposes. It was in a separate enhancement notice that could not have vested jurisdiction in the district court. It was thus properly a punishment issue under Art. 36.01, and the court of appeals erred to hold otherwise.

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[29] *See* TEX. CODE CRIM. PROC. art. 37.09(1); *Lomax v. State*, 233 S.W.3d 302, 311 (Tex. Crim. App. 2007) (finding felony DWI not a lesser of intoxication manslaughter because it requires facts—two prior DWI convictions—that intoxication manslaughter does not).

[30] TEX. CODE CRIM. PROC. art. 4.06.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals, and affirm the trial court's judgment and sentence for third-degree-felony assault.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,859 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of December 2018, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals's Opinion

2018 WL 5797241
Only the Westlaw citation is currently available.

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

(DO NOT PUBLISH)
Court of Appeals of Texas, Tyler.

HAROLD WAYNE HOLOMAN, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

NO. 12-17-00364-CR
|
Opinion delivered November 5, 2018.

Appeal from the 349th District Court of Anderson County, Texas (Tr.Ct.No. 349CR-15-32178)

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

MEMORANDUM OPINION

Greg Neeley, Justice.

***1** The State filed a motion for rehearing of our August 8, 2018 opinion. We overrule the motion for rehearing, withdraw our opinion and judgment of August, 2018, and substitute the following opinion and corresponding judgment in their place.

Harold Wayne Holoman appeals his conviction for felony assault family violence. In two issues, he argues that the evidence is insufficient to support his conviction and his sentence is unlawful because it exceeds the maximum punishment authorized by statute. We sustain Appellant's second issue, reform the judgment, and remand for a new punishment hearing.

BACKGROUND

Appellant was charged by indictment with assault family violence against Melissa Bostic, a member of Appellant's household. The indictment alleged that Appellant impeded Bostic's normal breathing or circulation of blood by applying pressure to her neck. Prior to trial, the State filed a written notice to seek a higher punishment range based upon prior felony convictions. The notice alleged that Appellant had prior convictions for felony drug possession and felony assault family violence. Subsequently, Appellant pleaded "not guilty" and the case proceeded to a jury trial.

The jury acquitted Appellant of the indicted offense, but returned a verdict of "guilty" on the lesser included offense of assault family violence. Appellant elected to have the trial court assess his punishment. The trial court found the enhancement allegations "true" and sentenced him to twenty-five years of imprisonment. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In Appellant's first issue, he argues that the evidence is "insufficient to support a felony assault causing bodily injury/family violence with previous conviction."

Discussion

Appellant's specific complaint regarding the sufficiency of the evidence is that the State failed to prove that Appellant had a previous conviction for assault family violence. In Texas, it is generally a Class A misdemeanor when a person "intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." TEX. PENAL CODE ANN. § 22.01 (a)(1)(b) (West Supp. 2017). However, it is a felony of the third degree if a person commits the offense against a person whose relationship to or association with the defendant is described by Section 71.0021(b) (dating relationship), 71.003 (family member), or 71.005 (member of the same household), Family Code if:

> (A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or
>
> (B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck by blocking the person's nose or mouth.

Id. § 22.01(b)(2)(A), (B); *see also* TEX. FAMILY CODE ANN. §§ 71.0021(b) (West Supp. 2017); 71.003 (West 2014); 71.005 (West 2014).

2** Here, Appellant was charged with third degree felony assault family violence by impeding breath or blood, not by having a previous conviction for family violence. ***Id. § 22.01(b)(2(B). The trial court instructed the jury on the lesser included offense of assault family violence as follows:

> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the felony offense of assault family violence by impeding the breath or blood, as alleged in the indictment, and you shall next consider the lesser-included offense of assault causing bodily injury family violence.
>
> Now, if you find from the evidence beyond a reasonable doubt that on or about the 1st day of October, 2013, in Anderson County, Texas, the defendant, Harold Wayne Holoman, did intentionally, knowingly, or recklessly cause bodily injury to Melinda Bostic, a member of the defendant's family or member of the defendant's household or person with whom the defendant has or had had a dating relationship as described by Section 71.003 or 71.005 or 71.0021(b), Family Code, then you will find the defendant guilty of the lesser-included offense of assault causing bodily injury family violence.

The jury acquitted Appellant of assault family violence by impeding breathing, but found Appellant "guilty" of the lesser included charge of assault family violence. Thus, based on the language of the court's charge to the jury, it is clear that Appellant was convicted of misdemeanor assault family violence. *See* ***Id***. § 22.01 (a)(1)(b). Because misdemeanor assault family violence does not require proof of a previous conviction. Appellant's contention that the evidence is insufficient to support felony assault causing bodily injury/family violence with previous conviction is without merit. We overrule Appellant's first issue.

ILLEGAL SENTENCE

In Appellant's second issue, he argues that his sentence is illegal because his sentence exceeds the punishment allowed by statute for misdemeanor assault family violence. We agree.

Discussion

In this case, Appellant was charged with assault family violence by impeding breath or blood, a third degree felony. ***Id.*** § 22.01(b)(2(B). However, the jury acquitted Appellant of the indicted offense, but found him "guilty" of "assault causing bodily injury family violence, a lesser-included charge of the indictment." As discussed earlier, the record demonstrates that the jury found Appellant "guilty" of *misdemeanor* assault family violence. Further, the State did not offer any evidence of Appellant's prior assault family violence convictions at the guilt/innocence stage of trial, nor did the jury make a finding that Appellant had a previous conviction for assault family violence. Thus, we conclude that Appellant was convicted of a Class A misdemeanor. *See* ***id.*** § 22.01(a)(1)(b). The punishment for a Class A misdemeanor is a fine not to exceed $4,000, confinement in jail for a term not to exceed one year, or both. ***Id.*** § 12.21 (1)-(3) (West 2011).

On original submission, the State argued that it proved Appellant had a previous assault family violence conviction which enhanced his conviction to a third degree felony. Further, the State argued that it proved Appellant had two prior sequential, final felony convictions which subjected Appellant to the habitual felony punishment statute, and therefore, Appellant's sentence is within range. *See* ***id.*** § 12.42 (d) (West Supp. 2017). We disagreed because the habitual offender statute under which Appellant was sentenced applies only to persons convicted of felony level offenses, which Appellant was not. *See generally* ***id.*** § 12.42.

3** For the first time on rehearing, the State directs our attention to the Court of Criminal Appeals' recent decision in ***Oliva v. State for the contention that the prior conviction provision in Section 22.01(b)(2)(A) should be considered as a punishment issue and not an element of the offense. 548 S.W.3d 518 (Tex. Crim. App. 2018).[1] In ***Oliva***, the Court held that Section 49.09(a), which prescribes that the existence of a prior conviction elevates a second DWI offense from a Class B misdemeanor to a Class A misdemeanor, is a punishment issue. ***Id.*** at 534; *see* TEX. PENAL CODE ANN. § 49.09(a) (West Supp.

2017). The court held that the DWI statutory scheme was ambiguous and relied on several textual and nontextual factors in arriving at its holding. ***Oliva***, 548 S.W. 3d at 523-34. In so doing, the court noted that the language used in the single prior conviction DWI statute is substantially identical to the felony DWI statute, but the jurisdictional nature of the prior convictions for felony DWI converted them from punishment issues to elements of the offense. Specifically, the court stated:

> Under this view, the jurisdictional nature of the two-prior conviction provision for felony DWI converts what would otherwise be a punishment issue into an element of the offense. Because the single prior-conviction provision for misdemeanor DWI is not jurisdictional, that conversion does not occur, so the provision retains its character as prescribing a punishment issue.

Id. at 533; *see also* TEX. PENAL CODE ANN. §§ 49.04; 49.09 (West Supp. 2017).

[1] There is a split of authority among our sister courts as to whether a prior family violence conviction is an element of the offense or a sentence enhancement. *Compare* ***Sheppard v. State***, 5 S.W.3d 338, 340 (Tex. App.—Texarkana 1999, no pet.) (treating prior conviction for family violence as an essential element of the felony assault offense) with ***State v. Cagle***, 77 S.W.3d 344, 347 n.2 (Tex. App.-Houston [14th Dist.] 2002, pet. ref'd) (treating prior conviction for family violence as a sentence enhancement instead of an element of the offense because of the operative statutory language in Section 22.01(b)(2)).

Here, the State concedes that "in the usual case, a prior family violence conviction is one of the 'jurisdictional' priors; it enhances what is otherwise a Class A assault to a third-degree felony." However, it argues that because Appellant was charged with assault family violence by impeding breath or blood, a felony offense which vested the district court with jurisdiction, the prior family violence conviction was not jurisdictional and could properly be considered at the punishment phase of trial. We reject this argument. It is axiomatic that the prior conviction provision in Section 22.01(b)(2)(A) is either an element of the offense of felony assault family violence with a previous conviction, or serves to enhance the punishment of a misdemeanor assault family violence, not both. We hold the prior conviction requirement for assault family violence is an element of felony assault family violence under Section 22.01(a)(1)(A) and is required to be proven at the guilt phase of trial. *See* ***Oliva***, 548 S.W.3d at 533.

Because the State offered no proof of Appellant's prior conviction for family violence at the guilt phase of trial, Appellant was found guilty of misdemeanor assault family violence; thus, his sentence of twenty five years confinement is outside the applicable range of punishment. *See* TEX. PENAL. CODE ANN. §§ 12.21(1)-(3); 22.01(a)(1)(b). A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal. ***Mizell v. State***, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (sentence outside maximum range of punishment for that offense is illegal); ***Speth v. State***, 6 S.W.3d 530, 532-33 (Tex. Crim. App. 1999) ("[A] defendant has an absolute and nonwaivable right to be sentenced within the proper range of punishment established by the Legislature.") Therefore, we hold that the trial court erred in pronouncing a void and illegal sentence in this case. Appellant's second issue is ***sustained***.

DISPOSITION

4** Having the necessary data and information to correct the trial court's judgment, we ***modify the judgment to reflect that Appellant was convicted of Class A misdemeanor assault family violence. *See* ***Asberry v. State***, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Further, we ***remand*** the case to trial court for a new punishment hearing consistent with this opinion. *See* ***id.***; *see also* ***Mizell***, 119 S.W.3d at 806; ***Speth***, 6 S.W.3d at 532-33.

JUDGMENT

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the judgment be **modified** to reflect that Appellant was

convicted of Class A misdemeanor assault family violence. It is further ORDERED, ADJUDGED and DECREED that this case be **remanded** to the trial court for a new punishment hearing consistent with this opinion; and that this decision be certified to the court below for observance.

All Citations

Not Reported in S.W. Rptr., 2018 WL 5797241