PD-0538-17

NO._____

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

EDDIE OFFIONG ETTE
Petitioner

v.

THE STATE OF TEXAS
Respondent

Petition is in Cause No. 1363508D from the
297th Criminal District Court of Tarrant County, Texas,
and Cause No. 02-15-00173-CR
in the Court of Appeals for the Second District of Texas

PETITION FOR DISCRETIONARY REVIEW

Daniel Collins
TBN: 24071079
Daniel Collins Law
3663 Airport Freeway
Fort Worth, Texas 76111
Phone: (682) 444-1004
Fax: (817) 886-2215
E-mail: Daniel@DanielCollinslaw.com
Attorney for Petitioner
Eddie Offiong Ette

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a list of all parties to the trial court's judgment, and respective trial and appellate counsel:

Presiding Judge
Hon. David Hagerman, presiding judge
297th Criminal District Court
Tarrant County, TX

Parties
The State of Texas (Appellee)

Eddie Offiong Ette (Appellant)

Attorneys for State
Doug Wallace (at trial)
Susan Linam
Debra Windsor (on appeal)
Tarrant County District Attorney's Office
401 West Belknap
Fort Worth, Texas 76196

Attorneys for Appellant
Greg Westfall (at trial)
Monroe Solomon
4200 W. Vickery Blvd., Floor 2
Fort Worth, TX 76102

Daniel Collins (on appeal)
3663 Airport Freeway
Fort Worth, Texas 76111

Eric Labovitz
5719 Airport Freeway
Fort Worth, TX 76117

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STATEMENT REGARDING ORAL ARGUMENT

Because Petitioner does not believe that oral argument will materially assist the Court in its evaluation of matters raised by this pleading, Petitioner respectfully waives oral argument.

STATEMENT OF THE CASE

Eddie Offiong Ette ("Mr. Ette" or "Petitioner") was indicted the felony offense of misapplication of fiduciary property in an amount exceeding $200,000. [C.R. 6]. On March 21, 22, 23, 24 , 29 and 30, 2016, a jury trial was held in the 297th Criminal District Court of Tarrant County. [II, III IV, V, VI & VII R.R. *passim*]. The jury found Mr. Ette guilty as charged in the indictment. [VII R.R. 7]. Punishment was to the jury, which assessed a sentence of ten (10) years incarceration, with a $10, 000 fine, but recommended that Mr. Ette be placed on probation. [VII R.R. 68]. A timely Notice of Appeal was filed on April 28, 2016. [C.R. 1460].

STATEMENT OF PROCEDURAL HISTORY

The Opinions by the Second Court of Appeals affirming Mr. Ette's conviction as modified was issued on May 18, 2017. *Ette v. State*, __ S.W.3d __, 2017 WL2178875 (Tex. App.–Fort Worth, May 18, 2017, no. pet. h.). This Petition for Discretionary Review is therefore timely.

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE

The court of appeals erred in affirming a fine included in the judgment which had not been orally pronounced by the trial court at sentencing.

REASONS FOR REVIEW

1. The opinion of the Second Court of Appeals court of appeals has decided an important question of state law in a way that conflicts with the applicable decision of the Court of Criminal Appeals. *See* TEX. R. APP. P. 66.3(c).

2. The Second Court of Appeals has so far sanctioned a departure from the accepted course of judicial proceedings by the trial court, as to call for an exercise of the Court of Criminal Appeals' power of supervision. *See* TEX. R. APP. P. 66.3(f).

ARGUMENT

GROUND FOR REVIEW ONE (RESTATED)

The court of appeals erred in affirming a fine included in the judgment which had not been orally pronounced by the trial court at sentencing.

A. ***Facts***

Petitioner was indicted for and went to trial on the felony offense of misapplication of fiduciary property in an amount exceeding $200,000, alleged to have occurred on or about December 10, 2007. [C.R. 6]. *See* TEX. PENAL CODE ANN. § 32.45(b), (c)(7) (West Supp. 2005) (amended by Acts 2015, 84th Leg., ch. 1251 (H.B. 1396), § 21, eff. Sept.

1, 2015).[1] The jury convicted Petitioner and assessed a ten-year probated sentence and a $10,000 fine which was not probated. [VII R.R. 7, 68]. The trial court sentenced Petitioner accordingly, with the exception that the fine was not pronounced orally at sentencing. [VII R.R. 69].

B. ***Opinion Below***

Pertinent to the complaint raised in this Petition, the court of appeals correctly recognized that the trial court did not orally assess the fine when pronouncing the sentence. *Ette*, __ S.W.3d __, 2017 WL2178875 at *6. However, the court qualified that omission with the word "inadvertent" as part of its construct utilized to utterly disregard binding authority of this court. *Id*. The court of appeal then proceeded to opine that the trial court's failure to articulate any fine at sentencing was somehow "ambiguous," and thereby permit the court to "harmonize" the jury's verdict, trial court's pronouncement, and trial court judgment to determine that the failure to assess the fine at

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[1] As noted by Mr. Ette on appeal, the judgment in this case contained a typographical error, wherein it states that the statute of conviction was 32.43(c)(7) of the penal code, rather than the correct 32.45(c)(7). The court of appeals amended the trial court judgment to show the correct statute of conviction. *See Ette v. State*, __ S.W.3d __, 2017 WL2178875, *7 (Tex. App.–Fort Worth, May 18, 2017, no. pet. h.).

sentencing was close enough for government work. *Id*. In support of this holding, the Second Court of Appeals cited to a string of unpublished cases; none of which are from this Court. *See id.* (citing *Hawkins v. State*, No. 02-15-00338-CR, 2016 WL 4474351, at *7–8 (Tex. App.—Fort Worth Aug. 25, 2016, pet. ref'd) (mem. op., not designated for publication); *Kimble v. State*, No. 02-15-00370-CR, 2016 WL 2840922, at *2 (Tex. App.—Fort Worth May 12, 2016, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, No. 02-12-00392-CR, 2014 WL 1510093, at *2–3 (Tex. App.—Fort Worth Apr. 17, 2014, no pet.) (mem. op., not designated for publication); *accord Cazares v. State*, No. 05-15-00231-CR, 2016 WL 3144274, at *1–2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op., not designated for publication); *Simmons v. State*, No. 05-15-00162-CR, 2016 WL 3144254, at *2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op., not designated for publication); *Jackson v. State*, No. 05-13-00004-CR, 2014 WL 2611106, at *7–9 (Tex. App.—Dallas June 11, 2014, no pet.) (mem. op., not designated for publication); *Neal v. State*, No. 08-07-00232-CR, 2010 WL 160206, at *9–10 (Tex. App.—El Paso, Jan. 13, 2010, pet. ref'd) (not designated for publication)).

What all of the State's unpublished cases have in common is their reliance on some "ambiguous sentence pronouncement rule" promulgated by the Waco Court of Appeals in *Aguilar v. State*, 202 S.W.3d 840, 843 (Tex. App.—Waco 2006, pet. ref'd).[2] In addressing situations where the trial court's sentencing pronouncement is "ambiguous," the *Aguilar* court held "that the jury's punishment verdict, the court's pronouncement, and the written judgment should be read together in an effort to resolve the ambiguity." *Id*. at 843. Problematically, the *Aguilar* court did not fortify this holding with any citation to authority which would support such a bald assertion. *Id*.

For reasons which will become evident, the majority opinion never cited, acknowledged, or alluded to this Court's controlling opinions in *Armstrong v. State*, 340 S.W.3d 759 (Tex. Crim. App. 2011); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) or *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002).

However, the dissenting opinion of Justice Kerr did cite to *Armstrong*, *Taylor*, and *Madding* in arguing that the trial court's failure

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[2] *See Hawkins*, 2016 WL 4474351 at *8; *Kimble*, 2016 WL 2840922 at *1 n.5; *Hernandez*, 2014 WL 1510093 at *2; *Cazares*, 2016 WL 3144274 at *1; *Simmons*, 2016 WL 3144254 at *2; *Jackson*, 2014 WL 2611106 at *8; *Neal*, 2010 WL 160206 at *9.

to assess a fine here was not "ambiguous" and that this Court's binding authority directed that the fine therefore be stricken from the judgment. *Ette*, __ S.W.3d __, 2017 WL2178875 at *8-*11 (Kerr, J., dissenting). The dissent was correct in holding that the trial court's sentencing pronouncement was not "ambiguous," but rather plainly was in conflict with the verdict and judgment, a reality which negated the application of the ambiguous sentence pronouncement rule manufactured by *Aguilar*. Specifically, the dissent argued,

> [w]hen the sentence omits a fine, there is neither a fine nor an ambiguity within the sentencing process about the fine's presence or absence. When, though, as in Aguilar, Hernandez, and Hawkins, something about the sentencing process itself suggests an ambiguity for varying reasons, I agree that courts may look outside the pronouncement of sentence for resolution—but it is improper to do so in order to create ambiguity in the first place. *Aguilar* itself, upon which all the other cases rely, did not go that far.

Id. at *11 (Kerr, J., dissenting). However, the dissent did not go far enough. The dissent gamely pointed out the distinction between the case at bar from the false construct created whole cloth by *Aguilar*, rather than arguing that the entire "ambiguous sentence pronouncement rule" was not a legitimate component of Texas statutory or case law.

C. *Controlling Law*

"A trial court's pronouncement of sentence is oral, while the judgment, including the sentence assessed, is merely the written declaration and embodiment of that oral pronouncement." *Madding*, 70 S.W.3d at 135 (citing TEX. CODE CRIM. PRO. ANN. ART. 42.01, § 1 (West Supp. 2015)). Thus, when the trial court's oral pronouncement conflicts with the written judgment, the oral pronouncement controls. *Id*. As the court stated in *Madding* :

> To orally pronounce one sentence to a defendant's face and then to sign a written judgment ... when the defendant is not present, that embodies ... [a] more severe sentence than the oral sentence, violates any notion of constitutional due process and fair notice. A defendant has a due process 'legitimate expectation' that the sentence he heard orally pronounced in the courtroom is the same sentence he will be required to serve."

Id. at 136.

Fines are punitive and are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Penal Code, which is entitled "Punishments." *Armstrong*, 340 S.W.3d at 767 (citing *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009)); *State v. Crook*, 248 S.W.3d 172, 174 (Tex. Crim. App. 2008) (holding fine is part of sentence). Fines must be orally pronounced in the defendant's

presence. *Armstrong*, 340 S.W.3d at 767. *Taylor*, 131 S.W.3d at 500.

The written judgment here includes a $10,000 fine. [C.R. 135]. The trial court failed to assess any fine when orally pronouncing Mr. Ette's sentence. [VII R.R. 69]. As is the case here, where there is a conflict between the orally-pronounced sentence and the written judgment, the sentence pronounced orally controls. *Taylor*, 131 S.W.3d at 502 (citing *Madding*, 70 S.W.3d at 135). Therefore, the written judgment was required by law to be modified to conform with the sentence pronounced orally. *Taylor*, 131 S.W.3d at 502; *see also* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). The court of appeals erred in failing to hold so.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court grant discretionary review and allow each party to fully brief and argue the issues before the Court of Criminal Appeals, and that upon reviewing the judgment entered below, that this Court reverse the opinion of the Second Court of Appeals.

Respectfully submitted,

/s/ Daniel Collins
Daniel Collins
TBN: 24071079

Daniel Collins Law
3663 Airport Freeway
Fort Worth, Texas 76111
Phone: (682) 444-1004
Fax: (817) 886-2215
E-mail: Daniel@DanielCollinslaw.com
Attorney for Petitioner
Eddie Offiong Ette

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count for the portion of this filing covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure is 1,403.

/s/ Daniel Collins
Daniel Collins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to counsel for the Appellees listed below pursuant to Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure through the electronic filing manager, as opposing counsel's email address is on file with the electronic filing manager, on this 24th day of May , 2017.

/s/ Daniel Collins
Daniel Collins

Debra Windsor
Tarrant Co. District Atty's Office
401 West Belknap
Fort Worth, TX 76196

Lisa McMinn
State Prosecuting Attorney
P.O. Box 13046
Austin, TX 78711-3046

APPENDIX

1. Opinion of the Second Court of Appeals, May 18, 2017.

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00173-CR

EDDIE OFFIONG ETTE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1363508D

OPINION

A jury found Appellant Eddie Offiong Ette guilty of the first-degree offense of misapplying more than $200,000 of fiduciary property. *See* Tex. Penal Code Ann. § 32.45(b), (c)(7) (West 2016).[1] The jury then assessed Appellant's

[1]In 2015, the legislature amended section 32.45(c)(7); the amount necessary for classifying the offense as a felony of the first degree was changed from "$200,000 or more" to "$300,000 or more." *See* Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, sec. 32.45(c)(7), 1993 Tex. Gen. Laws 3586, 3652–

punishment at ten years' confinement and a $10,000 fine, recommending the suspension of the confinement but not the fine. In two points, Appellant contends that (1) the trial court violated his right to confrontation and right to present a defense by limiting his cross-examination, and (2) the $10,000 fine assessed in the written judgment must be deleted because the trial court's oral pronouncement of sentence did not mention the fine. Because we hold that the trial court did not violate Appellant's rights to confrontation and to present a defense by limiting his cross-examination of the complainant and we uphold the lawful fine imposed by the jury, we affirm the trial court's judgment as corrected.

I. Background Facts

Appellant does not contest the sufficiency of the evidence. The evidence showed that complainant Nosa Evbuomwan and his wife, Ann, paid Appellant, who operated an insurance agency, $350,000 to procure two performance bonds. Appellant sent Nosa invoices showing that the gross premium for the two bonds was $379,000, that he applied a "discount" of $31,000 to the larger bond, and that his fee for each bond was $1,000. The Evbuomwans paid the $350,000, but Appellant failed to procure the two performance bonds. Instead of then returning the premiums, he claimed that the entire $350,000 was his fee and

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53, *amended by* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 21, sec. 32.45(c)(7), 2015 Tex. Sess. Law Serv. 4208, 4217 (codified at Tex. Penal Code Ann. § 32.45(c)(7) (2016)). Appellant's offense occurred in 2007 and predated the amendment.

spent the money.

II. Discussion

A. The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Rights to Confrontation and to Present a Defense by Limiting His Cross-Examination of Nosa.

In Appellant's first point, he contends that the trial court violated his right to confrontation and to present a defense when it limited the scope of his cross-examination of Nosa. We disagree.

1. Standard of Review

We review a trial court's ruling on the admissibility of evidence under an abuse-of-discretion standard. *Johnson v. State (Johnson I)*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* If the trial court's ruling is correct under any applicable legal theory, we will not disturb it even if the court gave a wrong or insufficient reason for the ruling. *Id.* A trial court's discretion to exclude evidence comes into play only after the Sixth Amendment right to cross-examination has been satisfied. *Johnson v. State (Johnson II)*, 433 S.W.3d 546, 551 (Tex. Crim. App. 2014).

2. Right of Confrontation

The Sixth Amendment's Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause's primary purpose is to secure for the defendant the opportunity to cross-examine

adverse witnesses because that is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Johnson I*, 490 S.W.3d at 909 (internal quotation marks omitted) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974)). Jurors deserve to have the theory of the defense presented to them "so that they (can) make an informed judgment as to the weight to place on (the witness'[s]) testimony." *Id.* (internal quotation marks omitted) (quoting *Davis*, 415 U.S. at 317, 94 S. Ct. at 1111).

As the Texas Court of Criminal Appeals has held, the Sixth Amendment right to cross-examine witnesses allows a party to attack the general credibility of those witnesses "or to show their possible bias, self-interest, or motives in testifying." *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009) (citing *Davis*, 415 U.S. at 316, 94 S. Ct. at 1110). A trial court may not prevent a defendant from pursuing a line of cross-examination which might provide a reasonable jury with a significantly different impression of the witness's credibility. *Johnson II*, 433 S.W.3d at 551.

It is not within a trial court's discretion to prohibit a defendant from engaging in otherwise appropriate cross-examination designed to show a witness's bias. *Id.* This check on "a trial court's discretion to limit cross-examination for bias appropriately accounts for the fact that . . . expos[ing] . . . a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination . . . and is always relevant" to the jury's view of the witness's credibility and the weight to be given to the

witness's testimony. *Id.* (internal quotation marks omitted). A trial court can abuse its discretion by excluding admissible evidence that the defendant offers to show the complainant's motive to falsely accuse him. *Johnson I*, 490 S.W.3d at 909.

If a complainant's credibility is central to the State's case, Texas law also favors admitting evidence that is relevant to the complainant's bias, interest, or motive to testify in a particular way. *Id.* at 910. The Texas Rules of Evidence generally "permit (a) defendant to cross-examine a witness for his purported bias, interest, and motive without undue limitation or arbitrary prohibition." *Id.* (internal quotation marks omitted) (quoting *Hammer*, 296 S.W.3d at 563).

But "the right to cross-examine is not unqualified." *Id.* at 909. A trial court may restrict "the scope and extent of cross-examination so long as those" restrictions do not chip away at "the Confrontation Clause's guarantee of an opportunity for effective cross-examination." *Id.* (internal quotation marks omitted) (quoting *Johnson II*, 433 S.W.3d at 552). The defendant is not entitled to cross-examine a witness in whatever way and to whatever extent he might wish. *Id.* at 909–10. Trial courts have "wide latitude under the Confrontation Clause to . . . restrict[] . . . cross-examination based on such criteria as harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 910 (internal quotation marks omitted) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986)). A defendant does not have an absolute right to

impeach a witness's general credibility. *Id.* (citing *Hammer*, 296 S.W.3d at 562–63).

3. Right to Present a Defense

The Supreme Court has recognized that under the United States Constitution, whether through "the Due Process Clause of the Fourteenth Amendment or the Compulsory Process or Confrontation Clauses of the Sixth Amendment," a defendant in a criminal case is entitled to "a meaningful opportunity to present a complete defense." *Holmes v. State*, 323 S.W.3d 163, 173 (Tex. Crim. App. 2010) (op. on reh'g) (internal quotation marks omitted) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 1731 (2006)). That right encompasses calling his own witnesses and cross-examining the State's. *See id.*

4. Analysis

a. Relevant Facts

Nosa and Ann bought a piece of property and had it platted into three lots. They wanted to build two commercial buildings, one at 1940 Enchanted Way and the other at 1900 Enchanted Way in Grapevine, Texas. Ann met with Appellant because the couple needed a performance bond for the construction of each building.

The dispute leading to Appellant's indictment was whether his fee for the two bonds was $2,000 or $350,000. The jury heard testimony that bond fees must be disclosed in writing. Appellant testified at trial and admitted that the

paperwork—written invoices that he generated—showed that his total fee was only $2,000.

b. The Excluded Evidence

Appellant sought to impeach Nosa by demonstrating that he had made contradictory claims about whether a $900,000 debt on the third lot—1920 Enchanted Way—had been paid. Before the jury, Nosa testified that he had repaid the indebtedness, but the debt was also listed in a bankruptcy petition. Outside the jury's presence, the following occurred:

> [DEFENSE COUNSEL]: Well, I mean, it—[the $900,000] was listed in a bankruptcy petition, which is kind of not the same as being paid back.
>
> THE COURT: I don't know if it was paid back or not. It could have been paid—still just because it was listed in a bankruptcy petition doesn't mean necessarily that it was not paid back but go ahead, what's the—what's the relevance here[?] . . . I take it you want to introduce the bankruptcy petition[,] correct[?]
>
> [DEFENSE COUNSEL]: Well, I, you know, yeah, of course, I would like to do that but I think that I at least get to impeach him with it.
>
> THE COURT: So you're offering it for impeachment value or are you offering it for—
>
> [DEFENSE COUNSEL]: For impeachment, Your Honor.
>
> [PROSECUTOR]: Your Honor, we would object that it would be improper impeachment items and it is not relevant. The reason, it would be improper impeachment is, since the bankruptcy was discharged, that's not evidence the loan was not paid back, that is evidence of nothing. We already know there is $900,000 indebtedness. This proves it was—it adds nothing to the argument, nothing to the case. If he says he paid the money back, that's the relevant question, not, well, didn't you still owe it in 2009.

THE COURT: Why don't you develop it a little more on cross outside the presence of the jury, [counsel]?

. . . .

VOIR DIRE EXAMINATION

BY [DEFENSE COUNSEL]:

Q. About June 1st of 2009, did Agape World Group Incorporated[2] file a petition in bankruptcy?

A. I don't remember the date but yes . . . .

. . . .

Q. And in this petition, were there listed certain creditors? Yes?

A. Yes.

Q. . . . . Surely, you knew that this bankruptcy was being filed, right?

A. Yes.

Q. And then listed in Schedule A under Real Property, there is 1920 Enchanted Way, $1.5 million which you presumed was the value?

A. Yes.

Q. And the amount of secured claim was $900,000, isn't that true?

A. Yes.

Q. And, in fact, 19—1920 Enchanted Way, as of June 1st of 2009, did you-all still own 1920 Enchanted Way?

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[2]Agape World Group was a real-estate-investment company that the Evbuomwans owned.

. . . .

A. Yes.

Q. And so you listed that as an asset, and you listed the amount of secured claim as $900,000?

A. Correct.

Q. And so take us through how you paid it back. Did this get discharged in bankruptcy or did that—that get bought out of bankruptcy?

A. The bankruptcy was withdrawn.

THE COURT: Hang on. We are far afield as to what—no we are not going to go down this road because whether or not [Nosa] paid back the [$]900,000 is irrelevant as to whether or not [Appellant] took $300,000 of their money. I don't understand why—why we're going down this road. Why are we going down this road?

[DEFENSE COUNSEL]: Your Honor, he opened the door to every bit of this.

THE COURT: How?

[DEFENSE COUNSEL]: I'd have to have you read back the last hundred questions and answers both on Direct and on Cross.

THE COURT: Well, you're the one that started down this road of how much debt they had, so what—whether or not it was discharged from bankruptcy, whether or not it was paid back is—has nothing to do with this indictment, so why are we going into it?

[DEFENSE COUNSEL]: It's a matter of credibility, Your Honor.

THE COURT: No.

[DEFENSE COUNSEL]: He opened the door to it.

THE COURT: No, we're not doing that.

[DEFENSE COUNSEL]: I'm [questioning] him about bias and prejudice.

THE COURT: We are going to land this thing today one way or another. Bring the jury back in.

[DEFENSE COUNSEL]: It's also questioning about motive, Your Honor.

THE COURT: No. You haven't established that either.

Bring them back in.

Defense counsel then resumed his cross-examination in the jury's presence.

c. The Excluded Evidence Is Not Relevant.

Appellant claims in his brief that the excluded evidence concerns "one of the subject properties." In fact, the evidence concerns the third lot from the original undivided piece of land the Evbuomwans bought. Ann testified about the third lot, located at 1920 Enchanted Way, but that lot was self-financed by the couple; it had nothing to do with the bonds they sought from Appellant.

d. The Excluded Evidence Has No Bearing on Appellant's Guilt.

At trial, Appellant cross-examined both Nosa and Ann extensively, and his cross-examination delved into the integrity of their business practices. In his closing argument of the guilt phase, Appellant argued that those business practices were highly suspect and that the Evbuomwans' testimony could not be believed.

Even if Appellant was correct in that assessment, though, the case did not turn on the couple's credibility—it turned on the paperwork. Appellant's own invoices provided that $348,000 of the $350,000 was to be used toward the two

performance bonds' premiums and only $2,000 of the $350,000 was apportioned to pay his fees.

e. The Trial Court's Exclusion of the Evidence Did Not Violate Appellant's Constitutional Rights.

We hold that the trial court did not violate Appellant's rights of confrontation and to present a defense by refusing to let him cross-examine Nosa about possible misrepresentations concerning another property unrelated to the bonds and unrelated to the documents prepared by Appellant regarding his fees for those bonds. *See Johnson I*, 490 S.W.3d at 909–10; *see also* *Palmer v. State*, Nos. 01-08-00141-CR, 01-10-00280-CR, 01-10-00281-CR, 01-10-00282-CR, 2010 WL 1729338, at *16 (Tex. App.—Houston [1st Dist.] Apr. 29, 2010, no pet.) (mem. op., not designated for publication) (citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264 (1998), and *Hammer*, 296 S.W.3d at 564–65) (stating that excluding evidence offered only to challenge the witness's general credibility does not violate the Confrontation Clause or the defendant's right to present a defense).

We overrule Appellant's first point.

B. We Reconcile the Jury Verdict on Punishment, the Oral Pronouncement, and the Judgment to Uphold the Fine.

In Appellant's second point, he contends that because the trial court did not orally pronounce the $10,000 fine during sentencing, the fine must be deleted from the judgment. We disagree.

1. Courts Uphold the Lawful Fine Imposed by the Jury When the Trial Judge Inadvertently Omits It from the Oral Pronouncement.

When the trial judge's oral pronouncement of the punishment assessed by the jury inadvertently omits the lawful fine determined by the jury, we harmonize the record before us—the jury verdict, the trial court's pronouncement, and the written judgment—to protect the valid jury verdict. *See Hawkins v. State*, No. 02-15-00338-CR, 2016 WL 4474351, at *7–8 (Tex. App.—Fort Worth Aug. 25, 2016, pet. ref'd) (mem. op., not designated for publication); *Kimble v. State*, No. 02-15-00370-CR, 2016 WL 2840922, at *2 (Tex. App.—Fort Worth May 12, 2016, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, No. 02-12-00392-CR, 2014 WL 1510093, at *2–3 (Tex. App.—Fort Worth Apr. 17, 2014, no pet.) (mem. op., not designated for publication); a*ccord Cazares v. State*, No. 05-15-00231-CR, 2016 WL 3144274, at *1–2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op.); *Simmons v. State*, No. 05-15-00162-CR, 2016 WL 3144254, at *2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op., not designated for publication); *Jackson v. State*, No. 05-13-00004-CR, 2014 WL 2611106, at *7–9 (Tex. App.—Dallas June 11, 2014, no pet.) (mem. op., not designated for publication); *Neal v. State*, No. 08-07-00232-CR, 2010 WL 160206, at *9–10 (Tex. App.—El Paso Jan. 13, 2010, pet. ref'd) (not designated for publication).

2. The Sentencing Facts Here Are Substantially the Same as *Kimble's* Facts.

Appellant elected to be punished by the jury. The jury assessed his

punishment at ten years' confinement and a fine of $10,000, well within the range of punishment for a first-degree felony. *See* Tex. Penal Code Ann. § 12.32 (West 2011). The trial court received and accepted the verdict and read it aloud:

> THE COURT: Note from the jury: "We have reached a decision." Signed by the foreman of the jury.
>
> Both sides ready to bring the jury in, receive and accept the verdict?
>
> . . . .
>
> THE COURT: Mr. Foreperson, we received a note. "The jury has . . . reached a verdict." Have you reached a verdict on punishment?
>
> FOREMAN: Yes, we have.
>
> THE COURT: Is it a unanimous verdict?
>
> FOREMAN: Yes, it is.
>
> THE COURT: Hand the verdict to the bailiff, please.
>
> Verdict form: We, the jury, having found [Appellant] guilty of the offense of misapplication of fiduciary property as charged in the indictment, assess his punishment at confinement in the Correctional Institutions Division of the Texas Department of Criminal Justice for 10 years and we do recommend that the imposition of his sentence be suspended and that he be placed on community supervision. In addition thereto, we, the jury, assess a fine of $10,000 and we do not recommend that such fine be suspended. Signed by the foreman of this jury.

After offering the parties a chance to poll the jury, which they declined, the trial court asked Appellant to rise and stated:

> The jury . . . having assessed your punishment at 10 years' confinement in the penitentiary and having recommended that your sentence be suspended, your sentence is hereby suspended and

> you will be placed on community supervision for a period of 10 years.

The trial judge omitted any mention of the lawful fine assessed by the jury from his repeated report of the jury verdict, though he had just read the entire verdict aloud and accepted it, and then he also omitted any mention of a fine from his pronouncement. He did not pronounce the $10,000 fine that the jury had assessed and he had accepted and recited to the jury; he did not pronounce a different fine; he did not pronounce a "zero" fine; and he did not refuse to pronounce a fine. His pronouncement, taken alone, does not reveal any clear intent regarding the fine.

Unlike the oral pronouncement, the written judgment matches the lawful jury verdict, and the bill of cost also reflects the $10,000 fine due.

These facts alone create a potential ambiguity in the sentence and justify resolving the case in favor of the jury verdict. *See, e.g.*, *Kimble*, 2016 WL 2840922, at *2; *see also Milczanowski v. State*, 645 S.W.2d 445, 447 (Tex. Crim. App. 1983) (explaining that in jury cases, "the written verdict provides the basis for reforming an erroneous recitation in judgment and sentence").

3. Appellant and the Trial Judge Signed Written Conditions of Community Supervision Requiring Appellant to Pay the $10,000 Fine.

The record here, however, offers even more compelling evidence of not only the trial court's intent to follow the law and therefore to impose the lawful fine determined by the jury but also the satisfaction of Appellant's rights to notice and

due process. Immediately following the oral pronouncement, the trial court stated,

> *Terms and conditions of your supervision are set out in the Court's documents, which I will give you in a few minutes, and you are ordered by the Court to follow each and every one of those conditions. If you violate any one of the terms and conditions, your probation may be revoked and you have to serve a term of incarceration.*
>
> . . . .
>
> Do you understand your sentence, [Appellant]?
>
> THE [APPELLANT]: Yes, Your Honor.
>
> . . . .
>
> *THE COURT: [Appellant], please stay around long enough to be admonished by the court officer as to your probation conditions.*

[Emphasis added.]

The written conditions of community supervision referred to in the trial court's colloquy with Appellant include payment of the fine as a condition of community supervision. Those conditions were signed by both the trial judge and Appellant on the same day as sentencing, and, taking the trial judge at his word, within minutes of the pronouncement. Thus, before he left the courtroom the day he was sentenced, Appellant had received notice from both the jury and the trial judge that he was required to pay the $10,000 fine.

4. We Uphold the Jury Verdict.

The context of the oral pronouncement in this case makes clear that Appellant, the State, and the trial judge understood the sentence to be what appeared in both the verdict and the judgment—ten years' confinement (with the

trial court accepting the jury's probation recommendation) and a $10,000 fine. *See* Tex. Penal Code Ann. § 12.32 (providing range of punishment for first-degre felonies). We therefore resolve the discrepancy in favor of the jury verdict. *See id*.; *Simmons*, 2016 WL 3144254, at *2 (relying on *Hill v. State*, 213 S.W.3d 533, 536–37 (Tex. App.—Texarkana 2007, no pet.)); *Kimble*, 2016 WL 2840922, at *2; *see also Milczanowski*, 645 S.W.2d at 447. We overrule Appellant's second point.

C. We Correct a Clerical Error in the Trial Court's Judgment.

The trial court's judgment recites that Appellant was found guilty of "MISAPPLICATION OF FIDUCIARY PROPERTY—OVER $200,000." As Appellant points out in his brief, under the section entitled "Statute for Offense," the judgment incorrectly refers to "32.43(c)(7) PC." The correct statutory provision is section 32.45(b)–(c)(7) as it existed at the time of the offense. *See* Tex. Penal Code Ann. § 32.45(b), Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, sec. 32.45(c)(7), 1993 Tex. Gen. Laws 3586, 3652–53 (amended 2015).

Appellate courts may modify incorrect judgments to make the record "speak the truth" when they have the necessary data and information to do so. *Edwards v. State*, 497 S.W.3d 147, 164 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Appellate courts have the power to modify whatever the trial court could have corrected by a judgment nunc pro tunc when the information necessary to correct the judgment appears in the record. *Morris v. State*, 496 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). An

appellate court's authority to modify incorrect judgments depends neither on a party's request nor on whether a party objected in the trial court. *Edwards*, 497 S.W.3d at 164. Accordingly, we delete the "32.43(c)(7) PC" from the judgment and replace it with "32.45(b)–(c)(7) PC." *See id.*; *see also Chavarria v. State*, No. 02-13-00463-CR, 2015 WL 1544204, at *4 (Tex. App.—Fort Worth Apr. 2, 2015, no pet.) (mem. op., not designated for publication) (deleting language from judgment that was not supported by the indictment or verdict).

III. Conclusion

Having overruled Appellant's two points, we affirm the trial court's judgment as modified.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: LIVINGSTON, C.J.; KERR and PITTMAN, JJ.

KERR, J., filed a dissenting opinion.

PUBLISH

DELIVERED: May 18, 2017

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00173-CR

EDDIE OFFIONG ETTE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1363508D

DISSENTING OPINION

Because the majority continues what I believe has become an ill-advised reliance on finding "ambiguity" when an oral sentencing conflicts outright with a verdict and judgment, I dissent from its disposition of Ette's second point.

If the trial court meant to include the fine at sentencing but simply forgot, it might in theory be a good idea to enforce the $10,000 fine at issue—found in the jury's verdict, in the judgment, and among the conditions of Ette's probation but

not in the oral pronouncement of sentence—but forgetfulness is a mistake, not an ambiguity. Really, we cannot know if the fine's omission was inadvertent at all; the court might have wrongly thought that a fine need not be pronounced during sentencing because every other part of the record included the fine. That is a different sort of mistake, but it too is no ambiguity.

I would sustain Ette's appellate point arguing that because the trial court did not pronounce the $10,000 fine during sentencing as the law requires, Ette has no fine to pay.

Reading the verdict and the sentence

During the trial's punishment phase, the court read the verdict aloud—including the fine—and then pronounced Ette's sentence—without the fine:

> THE COURT: Mr. Foreperson, we received a note. "The jury has . . . reached a verdict." Have you reached a verdict on punishment?
>
> FOREMAN: Yes, we have.
>
> THE COURT: Is it a unanimous verdict?
>
> FOREMAN: Yes, it is.
>
> THE COURT: Hand the verdict to the bailiff, please.
>
> Verdict form: We, the jury, having found the defendant, Eddie Offiong Ette, guilty of the offense of misapplication of fiduciary property as charged in the indictment, assess his punishment at confinement in the Correctional Institutions Division of the Texas Department of Criminal Justice for 10 years and we do recommend that the imposition of his sentence be suspended and that he be placed on community supervision. In addition thereto, we, the jury, assess a fine of $10,000 and we do not recommend that such fine be suspended. Signed by the foreman of this jury.

Does either side wish the jury to be polled?

[PROSECUTOR]: No, Your Honor.

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Defendant please rise.

In Cause No. 1363508D; State of Texas versus Eddie Offiong Ette. The jury, having found you guilty upon your plea of not guilty to the offense of misapplication of fiduciary property, and having assessed your punishment at 10 years' confinement in the penitentiary, and having recommended that your sentence be suspended, your sentence is hereby suspended and you will be placed on community supervision for a period of 10 years.

Terms and conditions of your supervision are set out in the Court's documents, which I will give you in a few minutes, and you are ordered by the Court to follow each and every one of those conditions. If you violate any one of the terms and conditions, your probation may be revoked and you have to serve a term of incarceration.

In addition to that, the Court will impose restitution in the amount of $350,000 as a condition of your probation.

Do you understand your sentence, Mr. Ette?

THE DEFENDANT: Yes, Your Honor.

The trial court's later-entered judgment tracked the jury verdict—but not the oral pronouncement of sentence—by including the $10,000 fine.

Mismatch between oral sentencing and the verdict and written judgment: ambiguity versus conflict

When a trial court orally pronounces a sentence that does not match the verdict or the judgment, is that an ambiguity or a conflict? The answer matters, because if a pronouncement is ambiguous, an appellate court may look beyond the pronouncement itself and harmonize it with both the verdict and the later-

entered judgment. *Aguilar v. State*, 202 S.W.3d 840, 843 (Tex. App.—Waco 2006, pet. ref'd). If, on the other hand, a trial court leaves something out of an otherwise unambiguous pronouncement of sentence, an appellate court's role is less clear.

Two seemingly irreconcilable principles are at work here.

The first is that a defendant's sentence "must be pronounced orally in his presence." *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) (citing Tex. Code Crim. Proc. Ann. art. 42.03 § 1(a) (West Supp. 2016)). "The judgment, including the sentence assessed, is just the written declaration and embodiment of that oral pronouncement." *Id.* And a hierarchy exists: "When there is a conflict between the oral pronouncement of sentence and the sentence in the written judgment, the oral pronouncement controls." *Id.* Although this principle applies most clearly in the nonjury setting, to my knowledge no court has viewed oral sentencing in a jury trial as purely ministerial or redundant or superfluous when done immediately following the trial court's reading the verdict aloud and in the defendant's presence. Indeed, by law "sentencing" differs substantively both from "reading the verdict" and from "entering judgment." Here, though, the majority's disposition effectively means that a trial court need not ensure that the oral sentencing is accurate, a lenience that I find discomfiting.

The competing principle is that if the oral sentencing itself is truly ambiguous, as opposed to explicitly conflicting with the verdict or judgment, "the jury's punishment verdict, the court's pronouncement, and the written judgment

should all be read together in an effort to resolve the ambiguity." *Aguilar*, 202 S.W.3d at 843; *see also Hawkins v. State*, No. 02-15-00338-CR, 2016 WL 4474351, at *7–8 (Tex. App.—Fort Worth Aug. 25, 2016, pet. ref'd) (mem. op., not designated for publication); *Kimble v. State*, No. 02-15-00370-CR, 2016 WL 2840922, at *1 (Tex. App.—Fort Worth May 12, 2016, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, No. 02-12-00392-CR, 2014 WL 1510093, at *2–3 (Tex. App.—Fort Worth Apr. 17, 2014, no pet.) (mem. op., not designated for publication). We have observed, sensibly, that this court-created exception harmonizes the sacrosanct nature of oral pronouncements with otherwise-conflicting common law, statutes, and constitutional provisions that place valid jury verdicts on punishment beyond a trial judge's ability to alter. *Kimble*, 2016 WL 2840922, at *1. I would restrict that narrow exception to instances of demonstrable ambiguity.

Discussion

Although Ette's sentencing conflicted with both the verdict and the judgment, nothing about the trial court's oral pronouncement of sentence was ambiguous in and of itself. Each of these three components—verdict, judgment, and sentencing—plays a distinct legal role; none is to be ignored or given short shrift.

The verdict: Under article 37.01 of the code of criminal procedure, a "verdict" is "a written declaration by a jury of its decision of the issue submitted to it." Tex. Code Crim. Proc. Ann. art. 37.01 (West 2006). We have that here: the

jury assessed Ette's punishment at ten years' confinement, sentence suspended, and a $10,000 fine, not suspended.

Article 37.04 requires a verdict to be "read aloud by the judge," and if it is "in proper form and no juror dissents therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court." *Id.* art. 37.04 (West 2006). The trial court here complied with article 37.04 by reading the jury's verdict aloud.

The judgment: Later code provisions deal with the trial court's entry of judgment:

> Sec. 1. A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant. The sentence served shall be based on the information contained in the judgment. The judgment shall reflect:
>
> . . .
>
> 7. The verdict or verdicts of the jury or the finding or findings of the court;
>
> 8. In the event of a conviction that the defendant is adjudged guilty of the offense as found by the verdict of the jury or the finding of the court, and that the defendant be punished in accordance with the jury's verdict or the court's finding as to the proper punishment;
>
> . . . .

Id. art. 42.01, § 1(7), (8) (West Supp. 2016).

Caselaw reinforces the idea, inherent in the quoted provisions, that a trial court may not alter a valid jury verdict on punishment: a court has "no power to change a jury verdict unless it is with the jury's consent and before they have

dispersed." *Ex parte McIver*, 586 S.W.2d 851, 854 (Tex. Crim. App. [Panel Op.] 1979); *see also State v. Dudley*, 223 S.W.3d 717, 721 (Tex. App.—Tyler 2007, no pet.) ("If a jury assesses a punishment authorized by the law, the trial court has no power to change that punishment verdict and has very little authority to do anything other than to impose that sentence.").

Oral pronouncement of sentence: Between the trial court's receiving the verdict and entering judgment, an intermediate step occurs—the oral sentencing. "The sentence is that part of the judgment . . . that orders that the punishment be carried into execution in the manner prescribed by law." Tex. Code Crim. Proc. Ann. art. 42.02 (West 2006). The pronouncement of sentence is also the appealable event; the written judgment simply memorializes and should comport with it. *See Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998); *Mapps v. State*, No. 05-03-01039-CR, 2004 WL 1173401, at *1 n.2 (Tex. App.—Dallas May 27, 2004, no pet.) (not designated for publication); *see also* Tex. R. App. P. 26.2 (stating that deadline for perfecting criminal appeal runs from date of sentence or an appealable order, not from date of written judgment).

With some inapplicable exceptions, article 42.03 provides that "sentence shall be pronounced in the defendant's presence." Tex. Code Crim. Proc. Ann. art. 42.03, § 1(a). For good reason, fines (along with any other punishments) must be orally pronounced in the defendant's presence. *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011); *Taylor,* 131 S.W.3d at 500. That is because "[f]ines are punitive" and are meant to be part of the convicted

defendant's sentence; they fall under Chapter 12 of the Texas Penal Code, which is titled "Punishments." *Armstrong*, 340 S.W.3d at 767.

Broader principles are also at stake. For a trial court to orally pronounce one sentence to a defendant's face and then, outside the defendant's presence, sign a written judgment embodying a different and more severe sentence violates constitutional due process and fair notice. *See Ex parte Madding*, 70 S.W.3d 131, 136 (Tex. Crim. App. 2002). "A defendant has a due process 'legitimate expectation' that the sentence he heard orally pronounced in the courtroom is the same sentence that he will be required to serve." *Id.*

This is not to say that ambiguities cannot and do not arise. *Aguilar*, the case that began the "sentencing ambiguity" line of decisions, presented a clear instance of just such a problem. There, when pronouncing sentence on six counts on which the jury had assessed punishment, the trial court pronounced one sentence without specifically tying it to its associated count—that is, by neglecting to utter the simple phrase "count four."[1] *Aguilar*, 202 S.W.3d at 843.

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[1]The trial judge's entire pronouncement of sentence was as follows:

> Aurelio Hernandez Aguilar, the jury having found you guilty, the Court finds you guilty and assesses your punishment therefor at confinement in the Institutional Division of the Texas Department of Criminal Justice on Count 1 for a term of 45 years. Count 2, you are sentenced to a period of 10 years in the Institutional Division of the Texas Department of Corrections [sic]. Count 3, it's the sentence of the Court that you be confined in the Institutional Division of the Texas Department of Criminal Justice for a period of 10 years. It is also the sentence of the Court, the jury having found you guilty and assessed your punishment, sentences you to confinement in the

The Waco court held that that particular sentence was ambiguous and then resolved the ambiguity by explicitly tying it to the fourth count. *Id.* I agree that the sentence itself in *Aguilar* was ambiguous under the common understanding of that word[2], and that the ambiguity could thus properly be resolved by looking at other portions of the record.

Another case of ambiguous sentencing is *Hernandez*, in which the trial court left out the jury-assessed fine. But unlike Ette's case, the prosecutor in *Hernandez* immediately prompted, "Judge, did you read his fine as well?" and the

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> Institutional Division of the Texas Department of Criminal Justice for a period of 10 years. Count 5, the jury having found you guilty and assess[ed] your punishment in the Institutional Division of the Texas Department of Criminal Justice for a period of 10 years, sentences you to a period of 10 years. Count 6, the jury having found you guilty and assessed your punishment on Count 6 at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of 15 years, the Court sentences you to a term of 15 years.
>
> I'm going to grant the State's motion to have the sentences run consecutively. In other words, they will be accumulating, and they will be stacked to the extent permissible by law.

Id.

[2]In the civil context, this court has recently reiterated the standard test for ambiguity when it comes to such things as contracts: "If the contracts are so worded that they can be given a certain or definite legal meaning or interpretation, then they are not ambiguous, and the court will construe them as a matter of law. . . . Ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; . . . . We are not permitted to rewrite an agreement to mean something it did not." *Rubinstein v. Lucchese, Inc.*, 497 S.W.3d 615, 625 (Tex. App.—Fort Worth 2016, no pet.). In my view, these principles logically apply if the words "contract" and "agreement" are replaced with "sentencing."

judge responded, “I did, $5,000.” 2014 WL 1510093, at *3. We held that the judge’s oral pronouncement was “potentially ambiguous,” and because the fine appeared in both the verdict and the later judgment, we resolved “any potential ambiguity” in favor of including the fine. *Id.* Contextually and contemporaneously, the *Hernandez* prosecutor was asking whether the trial judge intended to include the fine in the sentence, and the judge answered affirmatively. As we analyzed it, the potential ambiguity arose not from any overt mismatch between verdict, sentence, and judgment, but rather from the oral pronouncement’s having been so muddled.

The same can broadly be said about our decision in *Hawkins*, where the defendant’s own disruptive conduct during sentencing rattled the trial court and led it to omit the fine. *Hawkins*, 2016 WL 4474351, at *4, 7–8. We agreed with the State that an ambiguous sentencing existed because “Hawkins interfered with the trial court’s oral pronouncement of its judgment and that Hawkins should not benefit from his own invited error.” *Id.* at *7. To me, though, *Hawkins* stands more accurately for principles of invited error than actual “ambiguity.”

This court has faced the omitted-fine issue but one other time in a jury trial, although without the State’s having jumped in to clarify the trial court’s omission as in *Hernandez*, and without invited error as in *Hawkins*. In *Kimble*, we held that the sentence was ambiguous precisely—and only—because it failed to include the fine that was otherwise assessed, and we resolved what we labeled an “ambiguity” in favor of the sentence’s including the fine. 2016 WL 2840922, at *2.

This label and its import are where I part ways with the *Kimble* panel and with the majority here.[3]

When the sentence omits a fine, there is neither a fine nor an ambiguity within the sentencing process about the fine's presence or absence. When, though, as in *Aguilar*, *Hernandez*, and *Hawkins*, something about the sentencing process itself suggests an ambiguity for varying reasons, I agree that courts may look outside the pronouncement of sentence for resolution—but it is improper to do so in order to create ambiguity in the first place. *Aguilar* itself, upon which all the other cases rely, did not go that far.

Put differently, when the sentence fails to include a fine assessed by the jury, the sentence is inconsistent with the jury's verdict, but it is not for that reason ambiguous. Again, of course, a trial court may not vary the sentence from the verdict. *See McIver*, 586 S.W.2d at 854; *Dudley*, 223 S.W.3d at 721. But here the trial court did so anyway, and no one spoke up, as the prosecutor did in *Hernandez*. *See Hernandez*, 2014 WL 1510093, at *3 (holding that when judge failed to pronounce fine during sentencing, the prosecutor's questioning whether

[3]Because *Kimble* is an unpublished opinion, it has no precedential value. *See* Tex. R. App. P. 47.7(a). Two of our sister courts, relying on *Aguilar*, have also applied the ambiguity construct to a flat-out omission, but because I find *Aguilar* distinguishable, I respectfully disagree with those courts. *Cazares v. State*, No. 05-15-00231-CR, 2016 WL 3144274, at *1–2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op., not designated for publication); *Neal v. State*, No. 08-07-00232-CR, 2010 WL 160206, at *9–10 (Tex. App.—El Paso Jan. 13, 2010, pet. ref'd) (not designated for publication).

trial court intended to include the fine, along with other factors, was sufficient to resolve ambiguity).

It's true that the written judgment in Ette's case comports with the verdict, as it must. *See* Tex. Code Crim. Proc. art. 42.01, § 1(7), (8). Yet the judgment must also match the oral pronouncement of sentence, and if the two conflict, the court of criminal appeals has established that the oral pronouncement wins. *See Taylor*, 131 S.W.3d at 500.[4]

In the nonjury context, we routinely reform judgments to delete fines that were not orally pronounced at sentencing but that appeared in the judgment. *E.g.*, *Bone v. State*, No. 02-15-00452-CR, 2016 WL 7240603, at *1 (Tex. App.—Fort Worth Dec. 15, 2016, no pet.) (mem. op., not designated for publication); *Creed v. State*, No. 02-16-00046-CR, 2016 WL 4474360, at *2 (Tex. App.—Fort Worth Aug. 25, 2016, no pet.) (mem. op., not designated for publication); *Boone v. State*, No. 02-15-00417-CR, 2016 WL 4040563, at *2 (Tex. App.—Fort Worth July 28, 2016, no pet.) (mem. op., not designated for publication). Indeed, in *Bone* the State submitted a letter to us agreeing without hesitation that the unpronounced fine should be deleted from the judgment. *See Bone*, 2016 WL

[4]I am not persuaded by the majority's citation to *Milczanowski v. State*, 645 S.W.2d 445, 447 (Tex. Crim. App. 1983) (stating that in jury cases, "the written verdict provides the basis for reforming an erroneous recitation in judgment and sentence"). The quoted language merely drew a comparison between jury cases and the one there involved, which was a bench trial in which the trial court's judgment and sentence varied from the language of the charged offense. *Milczanowski* was not an ambiguity situation, nor did it involve a jury verdict, and so for me, its holding sheds no light here.

7240603, at *1. Is there a principled reason to construe the sentencing process differently in jury trials, when the statutes and rules draw no such distinction? I readily concede that sound policy might well dictate that we consider an omitted fine to be an implied term of an otherwise accurate oral sentencing—but that judicially created result needs to be described by a word other than "ambiguity."

In sum, whether the trial court here omitted the $10,000 fine at sentencing accidentally or under a mistaken belief that fines do not have to be orally pronounced—and I stress that we have no idea why the fine was left out—neither situation created an ambiguity in sentencing. The State could easily have sought immediate clarification; had it done so, the due-process concerns expressed in *Madding* would have been satisfied and, as in *Hernandez*, we could have properly construed the entirety of the sentencing proceedings to support the fine.

But under these facts, I cannot go along with mislabeling Ette's sentencing as ambiguous. I would sustain his second point and delete the $10,000 fine, and because the majority does not, I respectfully dissent.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

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