In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00138-CR

KENNETH RAY HAUN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1425663D

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

In Tarrant County,[1] C.W. testified, specifically and graphically, to being the victim of multiple sexual assaults by Kenneth Ray Haun when she was under the age of seventeen years. Haun appeals his two convictions for sexual assault of a child under the age of seventeen[2] and his two consecutive sentences of twenty years' imprisonment.

Haun argues that the evidence is insufficient to support his convictions, that the State engaged in incurable inflammatory argument, and that stacking his two twenty-year sentences was improper because it abused the trial court's discretion, invaded the province of the jury, denied Haun due process of law, and administered cruel and unusual punishment. We affirm the trial court's judgment because (1) sufficient evidence supports the trial court's judgment, (2) Haun's claim of improper argument was not preserved, and (3) stacking Haun's two sentences was not improper.

(1) Sufficient Evidence Supports the Trial Court's Judgment

Haun asserts that the evidence is legally insufficient to support his convictions. He does not claim that there is no evidence to support the convictions, but cites various items that tend to undermine the State's proof: a delayed outcry by C.W. claimed to have been prompted by a custody dispute, C.W.'s desire to keep living with Haun, and testimony by a resident who lived in

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[1]Originally appealed to the Second Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to Section 73.001 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Second Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]*See* TEX. PENAL CODE ANN. § 22.011(a)(2) (West 2011).

an adjacent room of the house that the abuse could not have happened. Because all of those undermining factors are merely items of evidence for the fact-finder to consider, we find in this record legally sufficient evidence to support the convictions.

To determine whether evidence is sufficient to support a conviction, we must "consider the combined and cumulative force of all admitted evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt." *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses, and juries may draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial." *Id.* (citing *Jackson*, 443 U.S. at 319; *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)).

> We defer to the fact-finder's determinations on witnesses' credibility and the weight to be given to their testimony and do not substitute our judgment on these matters. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). If there are conflicting inferences that could be supported by the evidence in the record, we assume that the fact-finder resolved the conflict in favor of the prosecution, even if that resolution is not explicitly within the record. *Id*. at 899 n.13 (quoting *Jackson*, 443 U.S. at 326 . . . .

Nowlin v. State, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015).

Sufficient without any other evidence is C.W.'s direct trial testimony that, when C.W. was less than seventeen years of age, Haun caused penile penetration of her vagina and mouth. Beyond C.W.'s testimony, this record also contains other evidence, including the following:

> (A) counselor Anna Zakrocka's trial testimony that C.W. told Zakrocka that Haun had sexually abused her;

> (B) nineteen-year-old C.W.'s report to her mother about Haun's earlier behavior toward C.W., causing her mother to encourage C.W. to seek counselling;
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> (C) twenty-three-year-old C.W.'s report during an extended interview with Detective Mary Almy concerning the alleged sexual assaults of C.W. by Haun when C.W. was between 14 and 17 years of age—the interview was part of a larger investigation by Almy that included interviews with numerous individuals associated with C.W. and Haun, all resulting in two arrest warrants obtained by Almy against Haun for aggravated sexual assault and sexual assault of C.W.;
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> (D) C.W.'s close confidant and mother figure Michelle Mullins' advising C.W. to seek counseling and to make a report of sexual abuse to police;
>
> (E) Haun's awareness of and concern for the promptness of C.W.'s menstrual cycles;
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> (F) C.W.'s mother's accusatory question to Haun in the presence of the minor C.W., and others, of whether Haun was having sexual intercourse with C.W.—an accusation springing from certain behavioral clues exhibited by C.W. to her mother; and
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> (G) symptoms exhibited by C.W. allegedly resulting from Haun's abuse, including self-harm, weight gain, anxiety, depression, and low self-esteem.
>
> Legally sufficient evidence supports Haun's convictions.

(2) Haun's Claim of Improper Argument Was Not Preserved

Haun also claims that the State made arguments that were so inflammatory they were incurable by objection. The State asserts that, by making no objection to the arguments, Haun forfeited this complaint. We agree with the State.

Haun cites a 1972 case to support his argument. *See Bray v. State*, 478 S.W.2d 89 (Tex. Crim. App. 1972). That case has been overruled.

> This Court has [previously] held a defendant may complain for the first time on appeal about an unobjected-to, erroneous jury argument that could not have been cured by an instruction to disregard. *See Romo v. State*, 631 S.W.2d 504, 505 (Tex. Crim. App. 1982). This Court also has held a defendant's failure to pursue to an

> adverse ruling his objection to a jury argument does not constitute a waiver where an instruction to disregard could not have cured the erroneous jury argument. *See Montoya v. State*, 744 S.W.2d 15, 37 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1227 (1988).
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> However, these holdings have been undermined by the enactment of Texas Rule of Appellate Procedure 52(a)[3] and this Court's more recent decision in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). In this case, appellant's complaint on appeal is that the prosecutor's second and third arguments exceeded the permissible bounds of jury argument and that the error in these arguments could not have been cured by an instruction to disregard. However, a defendant's "right" not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited by a failure to insist upon it. *See Marin*, 851 S.W.2d at 279; *Campbell v. State*, 900 S.W.2d 763, 774–77 (Tex. App.—Waco 1995, no pet.) (Thomas, C.J., concurring). Therefore, we hold a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal. Any prior cases to the contrary such as *Montoya* and *Romo* are expressly overruled. Before a defendant will be permitted to complain on appeal about an erroneous jury argument or that an instruction to disregard could not have cured an erroneous jury argument, he will have to show he objected and pursued his objection to an adverse ruling.

Cockrell v. State, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *see Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004); *Hopper v. State*, 483 S.W.3d 235, 236–37 (Tex. App.—Fort Worth 2016, pet. ref'd).

This point of error has not been preserved and is overruled.

(3) Stacking Haun's Two Sentences Was Not Improper

Haun attacks the trial court's order causing his two twenty-year sentences to run consecutively on the bases that it was an abuse of discretion, an invasion of the jury's discretion,

[3]*See* TEX. R. APP. P. 33.1.

cruel and unusual punishment, and a violation of due process of law.[4] We find no impropriety in the cumulation of Haun's sentences.

We review a stacking order for an abuse of discretion. *Byrd v. State*, 499 S.W.3d 443, 446–47 (Tex. Crim. App. 2016). Usually, that discretion of the trial court is absolute, if the law allows the imposition of cumulative sentences. *Id.*; *Smith v. State*, 575 S.W.2d 41 (Tex. Crim. App. 1979), *overruled in part on other grounds*, *LaPorte v. State*, 840 S.W.2d 412 (Tex. Crim. App. 1992); *see* TEX. CODE CRIM. PROC. ANN. art. 42.08 (West Supp. 2016). An abuse of discretion occurs if the court imposes consecutive sentences where the law requires concurrent sentences. *Byrd*, 499 S.W.3d at 446–47.

When a defendant is convicted of multiple offenses arising in the same criminal episode, they must run concurrently, unless they fit a statutory exception. TEX. PENAL CODE ANN. § 3.03(a) (West Supp. 2016). One such exception is the offense of sexual assault of a child of less than seventeen years of age. TEX. PENAL CODE ANN. § 3.03(b)(2)(A) (West Supp. 2016). Haun's convictions were both for sexual assault of a child of less than seventeen years of age. *See* TEX. PENAL CODE ANN. § 22.011(a)(2). The trial court was authorized to stack Haun's sentences.

No abuse of discretion appears.

We turn to the other bases on which Haun claims error in the sentence stacking: invasion of jury discretion, cruel and unusual punishment, and a denial of due process of law.

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[4]These points of error are multifarious and could be rejected on that basis. But, in the interest of justice, we will address the arguments. *See* TEX. R. APP. P. 38.1; *see also Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010) ("Because appellant bases his single point of error on more than one legal theory, his entire point of error is multifarious."); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008).

Although Haun uses these three phrases as reasons why the cumulation of his sentences was allegedly improper, he does not explain how and why the stacking is improper on these bases; and, though he even cites some cases in association with these assertions, the cited cases do not stand for the proposition that sentence stacking invades the jury's discretion, is cruel and unusual punishment, or denies due process. We have found no such authority. Also, his argument consists of bare assertions. Appellants must provide a brief containing "clear and concise argument[s] for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). "When a party raises a point of error without citation of authorities or argument, nothing is presented for appellate review." *State v. Gonzalez*, 855 S.W.2d 692, 697 (Tex. Crim. App. 1993). These three claims are inadequately briefed and need not be addressed. *Sierra v. State*, 157 S.W.3d 52, 64 (Tex. App.—Fort Worth 2004), *aff'd*, 218 S.W.3d 85 (Tex. Crim. App. 2007); *see* TEX. R. APP. P. 38.1(h).

Ordinarily, if a sentence falls within the range of punishment authorized by statute, it is not cruel or unusual. *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016). Cumulating sentences is not cruel and unusual punishment. *Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984); *Baird v. State*, 455 S.W.2d 259 (Tex. Crim. App. 1970).

Article 42.08's authorization for the trial court to cumulate sentences does not deny due process to a defendant. *Hammond v. State*, 465 S.W.2d 748, 752 (Tex. Crim. App. 1971).

No authority has been found supporting Haun's arguments against sentence stacking.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: December 27, 2016
Date Decided: February 10, 2017

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