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

No. 06-16-00141-CR

GREGG HADEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th District Court
Gregg County, Texas
Trial Court No. 44591-B

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

# MEMORANDUM OPINION

On February 12, 2015, Gregg Haden was charged in a single, eight-count indictment with four counts of aggravated sexual assault of a child and four counts of indecency with a child. A jury found Haden guilty on all counts, and pursuant to its recommendation, the trial court sentenced Haden to seventy-five years in prison on each count of aggravated sexual assault of a child and twenty years' confinement on each count of indecency with a child. The trial court ordered the sentences to run consecutively.[1]

On appeal, Haden raises four primary points of error, contending that the trial court erred (1) when it admitted impermissible hearsay, (2) when it admitted evidence of a prior bad act that resulted from an illegal search of Haden's cellular telephone, (3) by allowing the introduction of evidence of a prior bad act because the statute upon which the act was based has been found to be unconstitutional, and (4) by ordering Haden's sentences to run consecutively rather than concurrently. After modifying the judgment to reflect the correct statutes upon which Haden was charged, we affirm the judgment of the trial court.

## I. Background

### A. Charged Offense

Angie began dating Haden in February 2003, when Angie's son, John,[2] was three years old. Angie and Haden married in 2007, and John seemed happy with their union. Angie stated

[1]Haden filed a motion for new trial and motion in arrest of judgment, both of which were denied by the trial court.

[2]We refer to the child by a fictitious name in order to protect his privacy. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2014).

that Haden was an active participant in John's life, often taking John hunting and fishing. According to Angie, from 2007 until 2011, the family seemed to be doing well; however, in 2011, Haden was arrested for the offense of online solicitation of a minor, causing things to "change" for the family. Angie explained that John's attitude and mood changed and that he no longer wanted to participate in family activities. Angie testified further that John was regularly angry or frustrated with Haden and that Haden would oftentimes discipline John by making him sit at the kitchen table and write Bible verses, something that John disliked doing.

Jeremy Johnson, a youth pastor at the family's church, testified that he had frequent interaction with John and his family. Johnson explained that he had a connection with John and that eventually John began speaking to him about personal matters. Johnson stated that John usually came into his office, dropped his books and bag, and asked if he could go outside and explore. On one occasion, however, John "came in and kind of had his head down a little bit," and then handed Johnson a letter.[3] After reading the letter, Johnson became concerned and contacted the senior pastor of the church, who told Johnson he needed to contact the Department of Family and Protective Services (the Department). Johnson did as the senior pastor advised him to do.

[3]The letter stated,

> Sexual abuse means forcing a young person to take part in any kind of sexual activity. This may include kissing or touching genitals or breast. It may also include intercourse. Abuse might include asking a child to touch parts of his or her own body or showing children pornographic magazines or videos.
>
> In the summer of 2011 (June) my dad got arrested for sexting, which he started four months before. He always showed me videos on the computer that I didn't like.

Cindy Dowler Black, an investigator with the Harrison County Sheriff's Department, was asked to speak with John after he had been interviewed at the Children's Advocacy Center (CAC). Black stated that John had some communication issues. "He -- he was just -- I don't know, just kind of a little nervous about the whole situation, I think." Black explained that John brought an electronic device to their meeting and that he told her that he had typed in the following information on it the night before the interview:

> August 4th, 2007, [Haden] showed me pornographic videos, and he made -- and made me touch him. Not long after that, when me and [Haden] and my cousin [William] were moving stuff to our new house, [Haden] said you would give me and [William] BBs for our gun if we did something. I got it -- I got out of it, but [William] did not. I do not know what [William] had to do.

John informed Black that Haden had touched John's penis with his hand and his mouth and that Haden made John do the same thing to him. John told Black that these incidents occurred where Haden had lived and also at oil field locations and in a shop behind the residence where John and his mother had lived before Haden and his mother married and lived on Lefever Road.[4] John explained to Black that when they were at the oil fields, "[Haden] took [John]'s hand and put it on his penis and made his arm go up and down, but his hand and fingers didn't move; just his arm up and down" and that Haden put his mouth on John's penis. John told Black that Haden would put his hand or mouth on John's penis while showing John video recordings on his phone and that he had done so between five and ten times.

[4]Black said that each of the locations identified by John (except the Lefever Road property) are in Gregg County, Texas.

Black also testified that John had informed a CAC interviewer that Haden kept Playboy and Penthouse magazines at John's grandparents' home. John explained that Haden would take the magazines out of the bathroom cabinet when they were at his grandparents' house and that Haden would show them to John and his cousin, William, and then touch John.[5] Black went to the grandparents' home and found the magazines in the exact location John had said they would be.

In addition, Black explained to the jury that victims of sexual assault can often react very differently. When asked how quickly a child reports abuse, Black stated, "Depends on the child. You could have a child that tells after the first assault; you can have a child that takes this for years and years and doesn't say anything because they're still afraid of their attacker."

Steven Bradley Stovall, Angie's brother, testified that after he heard the accusations against Haden regarding John, he asked his son, William, if Haden had ever been inappropriate with him.[6] Steven explained, "Before we could get it out he just -- his body just dropped, a deer-in-the-headlight look. Just kind of a, 'Oh, my gosh, how do you know?'" "[I]t took less than a second for me to realize what the answer was to the question. So it was just kind of disbelief that it -- that it had happened." William, prodded by his mother for a response, replied in the affirmative.

At trial, William related that Haden had begun to act inappropriately toward him in 2008, when he was ten years old. William recalled that on the first occasion, Haden told William that if

[5]Black recorded her interview with John, which the defense offered into evidence at trial.

[6]Stovall explained that William spent time with John and that the two were together "probably weekly."

they complied with his directions, Haden would thereafter take the boys[7] to a sporting goods store. Haden directed William to go into the bathroom with him and pulled his penis from his pants, asking William if he wanted to touch it, to which William replied, "[N]o, no way." At that point, Haden redressed and then took William and John to the sporting goods store.

About a year later, Haden approached William again, but on this occasion, Haden touched William's penis with his hand and his mouth. William said that Haden told him that if he told anyone of the incident, they "would both get in trouble, and that no one needed to know." William related that this kind of behavior was repeated by Haden "[t]welve to fifteen times." William also testified that Haden would often obtain a magazine or movie that William described as being some form of pornographic material "[a]nytime [Haden] thought he could show [William] without someone else seeing." William also explained that Haden had been sexually inappropriate with William and John at the same time and that William had observed Haden "touch[] [John's] penis with his mouth and his hand."

John testified that Haden would "harass" him constantly in efforts to get him to engage in sexual activity. John stated that he had touched Haden's penis with his mouth and his hand and that Haden had touched John's penis with his mouth and his hand and he did not like to think about or remember the incidents that had happened with Haden. John explained that the alleged abuse occurred between 2007 and 2011 and that he decided to tell someone in 2011, after reading a book

[7]William stated that John was outside sitting in the truck at the time of the incident.

that explained that Haden's behavior was abuse and that it was wrong. It was then that John wrote a letter and gave it to Johnson, his church youth pastor.

John indicated that he recalled having spoken to Black in Marshall (at the Harrison County Sheriff's Department) about Haden's actions and said that his memory of the events was probably better when he spoke with Black than it was at trial, acknowledging that he could remember some of the events when he spoke with Black that he could no longer recall.

**B. Extraneous Offense**

Kevin Brownlee, formerly an officer in the Longview Police Department, Criminal Investigation Division and Child Exploitation Unit, testified that in June 2011,[8] he posted a "profile" on Craigslist as a part of a cyber-crimes operation. The profile was that of a fourteen-year-old boy named "Ryan" who lived in Longview, including photographs of a boy who was supposed to be Ryan.

Eventually, Brownlee found a personal advertisement that had been posted by another individual, using the search word "twink" (a word which means a "young, effeminate boy"). That advertisement indicated that the person posting it was "[l]ooking for young dick" and stated that he was a male seeking to engage in sexual relations with a "twink" who must be "white under 25 ddf."[9] Brownlee, posing as the fictitious Ryan, responded to the posting as "Ryan," stating that he was fourteen years old and lived in Longview. The following morning, Brownlee received a

[8]The extraneous offense was alleged to have occurred prior to the charged offenses.

[9]Brownlee testified that "ddf" means drug and disease free.

response. The response came from Haden's yahoo e-mail address, and it said, "K u white and what u look like?" and further inquiries from the same respondent.[10] Brownlee sent a rejoinder which stated, in part, "Txt me 903- . . .[11] my mom gone until like 2:30."

About five minutes later, Brownlee received a text on the TracFone that stated, "Hi the guy from [Craigslist]." In the next few minutes, photographs were exchanged, and Brownlee sent address information as to where the pair should meet. Several more text messages were exchanged, and Haden sent a message stating he would be at the designated location in ten minutes. Shortly after that, Haden wrote, "Ok meet at the exxon so I know you ant no cop." Brownlee continued texting with Haden to give detectives time to arrive at the location. When the detectives reached the designated location, they noticed several vehicles arriving and leaving, but a vehicle of the type registered to Haden remained in the parking lot.[12] Brownlee stated that he believed Haden became suspicious and left the parking lot. Brownlee and another officer followed Haden until a police vehicle equipped with lights and sirens stopped Haden.

[10]We interpret this as meaning, "Okay, are you white? What do you look like?"

[11]The telephone number was assigned to an undercover TracFone used for purposes of the investigation.

[12]Upon receipt of the e-mails and text messages from Haden, Brownlee was able to identify him through a Department database and was made aware of his name, his place of business, and the make and model of his vehicle.

Haden was arrested for the offense of online solicitation of a minor[13] and transported to the Longview Police Department. Although Brownlee and Secret Service Agent Todd Hiles attempted to interview Haden,[14] Haden refused to participate.

Upon inventorying the contents of Haden's truck, the police discovered a cell phone, and Haden signed a consent for authorities to search its contents.

After viewing the contents of Haden's cell phone, a subpoena was served on Yahoo in an effort to obtain information regarding Haden's e-mail account. Brownlee obtained information from Yahoo that the account (which had been created prior to the incident and was still active) was carried in Haden's name. The records also revealed that Haden had posted several personal advertisements wherein the person posting the advertisement sought a white, drug- and disease-free, young male who would be willing to engage in sexual activity with him.

## II. Discussion

### A. Proper Outcry Witness

Haden contends that Black was not a proper outcry witness as defined by Article 38.072 of the Texas Code of Criminal Procedure and that it was error to allow her testimony. Specifically, Haden maintains that Black could not fit the definition of an outcry witness because she was the third person over the age of eighteen with whom John had "discussed the allegations." The State

[13]The charge was based on Haden "arriving at a meet site in order to have deviant sexual contact with an underage male."

[14]According to Brownlee, although interviews are typically recorded, Haden's interview was not recorded due to an equipment malfunction.

responds, among other things, that Haden introduced the recording of John's interview with Black (which contained the asserted outcry about which Black testified) and, thus, he waived any complaint which he would have possessed regarding the admission of Black's testimony.

**1. Standard of Review**

A trial court has "broad discretion" in admitting outcry-witness testimony. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990). A trial court's determination that an outcry statement is reliable and admissible will not be disturbed on appeal absent a clear abuse of discretion. *Id*. "Under an abuse of discretion standard, the trial court's decision to admit evidence must be reasonable in view of all the relevant facts." *Reynolds v. State*, 227 S.W.3d 355, 369–70 (Tex. App.—Texarkana 2007, no pet.) (citing *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006)). "We will defer to the trial court's ruling if it is within the zone of reasonable disagreement." *Id*. at 370 (citing *Shuffield*, 189 S.W.3d at 793).

**2. Applicable Law**

The Texas Code of Criminal Procedure allows the admission of certain hearsay testimony in the prosecution of sexual offenses against minors. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2016). To be admissible under Article 38.072, outcry testimony must be elicited from the first adult to whom the outcry is made. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd). Admissible outcry witness testimony is not person-specific, but is, rather, event-specific. *Broderick*, 35 S.W.3d at 73. To be a proper outcry statement, the child's statement to the witness must describe

the alleged offense, or an element of the offense, in some discernible manner and must be more than a general allusion to sexual abuse. *Lopez*, 343 S.W.3d at 140; *Broderick*, 35 S.W.3d at 73 (citing *Thomas v. State*, 1 S.W.3d 138, 140–41 (Tex. App.—Texarkana 1999, pet. ref'd)).

**3. Analysis**

Although Haden objected when it was proffered, Black's outcry-witness testimony was admitted. Haden, however, offered the recording into evidence of Black's out-of-court interview with John; this recording contained evidence that was very similar in content to Black's in-court testimony. The State contends that when Haden offered the recording, he waived his earlier objection to Black's outcry-witness testimony. We find it unnecessary to determine whether Haden waived his objection because his contention is meritless for another reason.

At trial, Haden initially argued that Johnson was the proper outcry witness, and he later argued that Kelli Faussett, a CAC interviewer, was the proper outcry witness. On appeal, Haden argues,

> In this case, testimony from state witnesses indicated that, at best, investigator Cindy Black was, at best the third adult over the age of 18 the child discussed the allegations with. The first was the youth pastor, the second was the child's mother, the third was the forensic interviewer at the Child Advocacy Center, and Ms. Black was the fourth. Even, *arguendo*, if the child did not discuss the details of the allegations at hand with one of the prior names witnesses, Investigator Black still would be the third qualifying adult and not qualify as the outcry witness for the purposes of this trial.

While Haden contends that because Black was not the first person to whom John described the abuse because she would not have been the witness described by statute to be an outcry witness, he fails to point to a specific conversation between John and any other witness wherein John

explained Haden's behavior in some discernible manner that amounted to something more than a general allusion to sexual abuse. *See Lopez*, 343 S.W.3d at 140. On the other hand, the record shows that John explained to Black, in detail, specific instances of Haden's abuse. Therefore, we cannot find that the trial court abused its discretion when it found that Black was the first person to whom Haden made a detailed outcry or by allowing her to testify as the outcry witness.

For these reasons, we overrule Haden's first point of error.

**B. Evidence of Prior Bad Acts**

Prior to trial, Haden filed a motion to suppress evidence, arguing that the discovery of the contents of his cell phone violated his *Miranda* rights.[15] The trial court denied his motion and admitted the evidence found on his cell phone. On appeal, Haden argues that his constitutional rights were violated because he informed investigators that he did not want to proceed with the interview but, despite the invocation of his rights, Brownlee continued his interrogation by asking for consent to search his cell phone. The State contends that Haden gave Brownlee written consent to search his cell phone and, therefore, his *Miranda* rights were not violated.[16]

[15]The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. *Miranda* extended that protection to statements elicited in a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

[16]The State also contends that Haden waived his objection on appeal because, at trial, he failed to object when the State offered the business records from Haden's Yahoo e-mail account, which account contained all of Haden's Craigslist personal ads that were found on his phone. Because we find that the trial court did not err in admitting the contents of Haden's cell phone, we find it unnecessary to address whether Haden waived his argument on appeal.

### 1. Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997). We afford almost total deference to a trial court's decision regarding historical facts, particularly when that determination is based on the witnesses' credibility or demeanor. *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). The trial court is the sole trier of facts and the judge of the credibility of the witnesses, as well as the weight given to their testimony. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). The trial court may believe or disbelieve all or part of a witness' testimony, and we recognize that the trial court had the opportunity to observe the witness' demeanor and appearance. *Id*. However, questions of law and "mixed question of law and fact" that do not depend on an evaluation of credibility and demeanor are reviewed de novo. *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005). As in this case, when a trial court does not enter findings of fact, we review the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact supporting that ruling. *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000). We will sustain a trial court's ruling if it finds reasonable support in the record and is correct under any theory of law that is applicable to the case. *Valtierra*, 310 S.W.3d at 447–48.

### 2. Applicable Law

"[C]onsent to search is not an incriminating statement; it is not in itself evidence of a testimonial or communicative nature." *Jones v. State*, 7 S.W.3d 172, 175 (Tex. App.—Houston

[1st Dist.] 1999, pet. ref'd) (quoting *Smith v. Wainwright*, 581 F.2d 1149, 1152 (5th Cir. 1978) (alteration in original)). In *Jones*, the Houston Court of Appeals examined *United States v. McClellan*, 165 F.3d 535, 539–40 (7th Cir. 1999). *Jones*, 7 S.W.3d at 175. In *McClellan*, the court stated that "because the giving of such consent is not a self-incriminating statement," a request to search does not constitute interrogation in the *Miranda* context. *McClellan*, 165 F.3d at 544 (quoting *United States v. Shlater*, 85 F.3d 1251, 1256 (7th Cir. 1996)); *see also Smith v. Wainwright*, 581 F.2d 1149, 1152 (5th Cir. 1978).

**3. Analysis**

Although Haden refused to sign a waiver of his right to consent to the interview, Brownlee was not required to discontinue his investigation into the matter, and he continued his investigation. As a part of that investigation, Brownlee sought to examine the contents of the cell phone that had been found in Haden's vehicle. Brownlee's search of Haden's phone could be accomplished in one of two ways: either by (1) obtaining a search warrant or (2) obtaining Haden's voluntary consent. *See Kolb v. State*, 532 S.W.2d 87, 89 (Tex. Crim. App. 1976) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). The record shows that Brownlee sought Haden's consent to search the cell phone and that Haden voluntarily signed a consent form allowing Brownlee to search the phone. Brownlee's request to search the contents of the cell phone did not constitute an interrogation[17] in a *Miranda* context, and Haden's consent to allow the

[17]"'Interrogation' is defined as express questioning and 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Jones*, 7 S.W.3d at 174 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

search of that cell phone was not an incriminating statement. *See Jones*, 7 S.W.3d at 175. Accordingly, there was no violation of Haden's constitutional rights and, thus, the trial court did not err when it allowed into evidence the contents of Haden's cell phone.

We overrule Haden's second point of error.

### C. Prior Bad Acts and Extraneous Offenses

The trial court allowed the State to present evidence that Haden had committed extraneous offenses,[18] prior bad acts, or crimes,[19] which acts were in violation of Section 33.021(c) of the Texas Penal Code. Haden contends that because Section 33.021 of the Texas Penal Code (which criminalizes online solicitation of a minor) has been held facially unconstitutional,[20] the trial court erred in admitting evidence that Haden had violated its proscription. Although the State concedes that a portion of Section 33.021 has been declared unconstitutional, 33.021(c) (which is the part of the statute Haden was alleged to have violated) has not been declared unconstitutional.

[18]Article 38.37 contains a Rule of Evidence applicable to certain types of sexual abuse cases, including this one. TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2016). Specifically, Article 38.37, Section 2(b) provides that "[n]otwithstanding Rules 404 and 405 [of the] Texas Rules of Evidence," evidence that a defendant committed a separate sexual or assaultive offense against a child "may be admitted in the trial" for an alleged offense of aggravated sexual assault of a child "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b).

[19]Rule 404(b) states, "Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). There are, however, exceptions to this Rule. "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2).

[20]*Ex parte Lo*, 424 S.W.3d 10, 16 (Tex. Crim. App. 2013).

### 1. Standard of Review and Applicable Law

Whether a statute is facially constitutional is a question of law that appellate courts review de novo. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007). A facial challenge attacks the statute itself rather than the statute's application to the accused. *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015). In most cases, to mount a facial challenge, the burden rests on the individual challenging the statute to demonstrate its unconstitutionality. *Lo*, 424 S.W.3d at 15. However, when a statutory provision is content-based, then the ordinary statutory presumptions do not apply and the statute will be presumed invalid; under that circumstance, the State must rebut that presumption. *Id.* "The Supreme Court applies the 'most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.'" *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)). However, if the statute at issue punishes conduct rather than speech, a court must apply a "rational basis" level of review to determine if the statute "has a rational relationship to legitimate state purpose." *Salgado v. State*, 492 S.W.3d 394, 396 (Tex. App.—Beaumont 2016, no pet.).

### 2. Analysis

Section 33.021(c) of the Texas Penal Code, entitled "Online Solicitation of a Minor," states,

> A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.

TEX. PENAL CODE ANN. § 33.021(c) (West 2016). Accordingly, subsection (c) punishes an individual's conduct, not the content of his speech. "Such solicitation statutes exist in virtually all states and have been routinely upheld as constitutional because 'offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from First Amendment protection.'" *Lo*, 424 S.W.3d at 16.

In this case, Haden was alleged to have committed the extraneous offense of online solicitation with a minor pursuant to subsection (c). Contrary to Haden's contention, subsection (c) of the statute—unlike subsection (b)[21]—has not been held to be facially unconstitutional. Haden fails to direct us to a case in support of his position that would lead us to conclude otherwise, and we find none ourselves.

We overrule Haden's third point of error.

**D. Stacking Haden's Sentences Was Not Improper**

Haden contends that the trial court erred by ordering his sentences to run consecutively because the evidence is insufficient to find that the offenses occurred in the same criminal episode. The State contends that the Texas Penal Code allows consecutive sentencing for sexual crimes against children and, as such, the trial court did not err when it ordered Haden's sentences to run consecutively.

[21]Section 33.021(b) is entitled "Sexually Explicit Communications." The Texas Court of Criminal Appeals has held that Section 33.021(b) is facially unconstitutional. *See Lo*, 424 S.W.3d at 27 (op. on reh'g) (per curiam).

### 1. Standard of Review and Applicable Law

We review a trial court's decision to "stack" or cumulate sentences for an abuse of discretion. *Byrd v. State*, 499 S.W.3d 443, 446–47 (Tex. Crim. App. 2016). So long as the law allows the imposition of cumulative sentences, a trial court has the absolute discretion to stack them. *Id.*; *Smith v. State*, 575 S.W.2d 41 (Tex. Crim. App. [Panel Op.] 1979), *overruled in part on other grounds by 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 trial court imposes consecutive sentences when the law requires concurrent sentences. *Byrd*, 499 S.W.3d at 446–47.

### 2. Analysis

When a defendant is convicted of multiple offenses arising in the same criminal episode,[22] the sentences must run concurrently unless they fall within a statutory exception. TEX. PENAL

[22]Section 3.01 of the Texas Penal Code defines "criminal episode" as:

> [T]he commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
>
> (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE ANN. § 3.01 (West 2011).

CODE ANN. § 3.03(a) (West Supp. 2016).[23] Two such exceptions are the offenses of aggravated sexual assault of a child[24] and indecency with a child.[25] TEX. PENAL CODE ANN. § 3.03(b)(2)(A).

Haden was charged with four counts of aggravated sexual assault of a child and four counts of indecency with a child. According to the indictment against Haden, the State was required to prove that on or about May 7, 2011, and on or about August 20, 2011, Haden touched John's genitalia with his hand and his mouth and that Haden caused John to touch Haden's genitalia with his hand and his mouth.[26] The jury found Haden guilty of these eight alleged offenses, and Haden

---

[23]Section 3.03(a) and (b)(2)(A) states,

> (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.
>
> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:
>
> . . . .
>
> (2) an offense:
>
> (A) under Section 33.021 or an offense under Section 21.02, 21.11, 22.011, 22.021, 25.02, or 43.25 committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section.

TEX. PENAL CODE ANN. § 3.03(a), (b)(2)(A) (West Supp. 2016).

[24]Aggravated sexual assault as defined in Section 22.021, subsections (a)(1)(B)(iii) and (2)(B) of the Texas Penal Code. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (2)(B) (West Supp. 2016).

[25]Indecency with a child as defined in Section 21.11(a)(1). TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011).

[26]The State's indictment alleged that Haden committed four separate offenses on two separate days, resulting in a total of eight alleged offenses.

does not argue there was insufficient evidence to support the jury's guilty verdicts. It is inarguable that offenses of which the jury found Haden guilty arose within the same criminal episodes, all of which were tried in a single criminal action. Under many circumstances, that fact would require the judgment to have the convicted person serve the sentences concurrently and not consecutively. TEX. PENAL CODE ANN § 3.03(a). However, the assessment of consecutive sentences is permissible in the punishment for crimes such as those of which Haden was convicted. TEX. PENAL CODE ANN § 3.03(b)(2)(B). Thus, the trial court did not err when it ordered Haden's sentences to run consecutively.

We overrule Haden's fourth point of error.

**E. Clerical Error in Judgment**

This Court has the power to modify a judgment of the trial court to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b) (providing that appellate courts may modify judgments and affirm as modified); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). When a judgment and sentence improperly reflect the jury's findings, the proper remedy is reformation of the judgment. *Aguirre v. State*, 732 S.W.2d 320, 327 (Tex. Crim. App. [Panel Op.] 1982) (op. on reh'g). "The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court." *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd).

Haden was charged and convicted of multiple counts of (1) aggravated sexual assault of a child, an offense found in Section 22.021 of the Texas Penal Code, and multiple counts of (2) indecency with a child, an offense found in Section 21.11 of the Texas Penal Code. However, the judgment of conviction[27] in this case recites Section 22.11(a)(2)(B) and Section 22.11(a)(1) of the Texas Penal Code as the "Statute for Offense." Section 22.11, entitled "Harassment by Persons in Certain Correctional Facilities" and "Harassment of Public Servant," does not apply in this case. *See* TEX. PENAL CODE ANN. § 22.11 (West Supp. 2016). We, therefore, modify the judgment of conviction by replacing Sections "22.11(a)(2)(B)" and "22.11(a)(1)" with Sections "22.021"[28] and "21.11"[29] to reflect Haden's convictions under the correct statutes.

## III. Conclusion

We affirm the trial court's judgment, as modified.

Bailey C. Moseley
Justice

Date Submitted: March 7, 2017
Date Decided: May 18, 2017

Do Not Publish

[27]The trial court entered one judgment of conviction containing each of the eight offenses upon which Haden was found guilty.

[28]A person commits aggravated sexual assault if he "intentionally or knowingly . . . causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor . . . and . . . if . . . the victim is younger than 14 years of age." TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (2)(B).

[29]A person commits the offense of indecency "if, with a child younger than 17 years of age, whether the child is the same or opposite sex, the person . . . causes the child to engage in sexual contact." TEX. PENAL CODE ANN. § 21.11(a)(1).