TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00737-CR

Sarah Elizabeth Whary, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT
NO. 67179, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Sarah Elizabeth Whary was charged with "intentionally or knowingly, by omission, caus[ing] bodily injury to" her child A.W., who was "a child 14 years of age or younger, by failing to provide immediate medical care." *See* Tex. Penal Code § 22.04(a), (b) (setting out elements of offense). After being charged, Whary entered a plea of guilty, and the district court deferred her adjudication of guilt and placed her on community supervision for ten years. A few years later, the State filed a motion to adjudicate alleging that Whary had violated several conditions of her community supervision. Following a hearing addressing the motion to adjudicate, the district court rendered its judgment adjudicating Whary's guilt and sentencing her to ten years' imprisonment. *See id.* § 22.04(f) (specifying that offense is third-degree felony); *see also id.* § 12.34 (listing permissible punishment range for third-degree felony). In its judgment, the district court also assessed Whary $527 in court costs. The bill of costs contained a list of the court costs imposed and stated

that one of the costs was a $25 sheriff's fee, but nothing in the bill of costs or in the remainder of the record sets out how the amount of that fee was determined. In two issues on appeal, Whary challenges the imposition of the $25 fee and asserts that there is an error on the face of the judgment requiring modification. We will affirm the district court's judgment adjudicating Whary's guilt.

DISCUSSION

Sheriff's Fee

In her first issue on appeal, Whary contends that "[t]he statute authorizing the imposition of a sheriff's fee does not support the amount actually assessed in this case, so the judgment should be reformed accordingly."[1]

The payment of court costs is mandated by the legislature. *Houston v. State*, 410 S.W.3d 475, 477 (Tex. App.—Fort Worth 2013, no pet.); *see also* Tex. Code Crim. Proc. arts. 42.15(a) (applying to judgments that impose fines and requiring defendant to pay fine as well as "costs to the state"), .16 (requiring payment of costs when "punishment is any other than a fine"). However, the defendant may only be obligated to pay court costs that are "statutorily authorized." *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *see also* Tex. Code Crim. Proc. art. 103.002 (providing that "[a]n officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law"). Because court costs do not need to be

[1] In her brief, Whary mentions that she was also improperly charged a sheriff's fee in the amount of $25 when she was originally placed on deferred adjudication, but Whary concedes that she may not challenge the imposition of that fee in this appeal. *See Perez v. State*, 424 S.W.3d 81, 86 (Tex. Crim. App. 2014) (concluding that appellant "forfeited any appellate complaint as to" assessment of $203 in court costs because "appellant failed to challenge the $203 assessment of costs in a timely appeal of that deferred adjudication order").

incorporated into a judgment by reference or orally pronounced, defendants may challenge the imposition of court costs for the first time on appeal. *Johnson*, 423 S.W.3d at 389, 391. When a defendant challenges the imposition of court costs, reviewing courts determine if there is a basis for the costs but do not determine if sufficient evidence was offered during the trial to support each cost. *Id.* at 390; *see Martinez v. State*, 510 S.W.3d 206, 208 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

The imposition of sheriff's fees is authorized by article 102.011 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 102.011. That provision authorizes the imposition of various types of fees for services provided by law-enforcement personnel when a defendant is convicted of a felony or a misdemeanor. *See id.* In particular, the provision authorizes the imposition of the following types of fees:

> (1) $5 for issuing a written notice to appear in court following the defendant's violation of a traffic law, municipal ordinance, or penal law of this state, or for making an arrest without a warrant;
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> (2) $50 for executing or processing an issued arrest warrant, capias, or capias pro fine . . . ;
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> (3) $5 for summoning a witness;
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> (4) $35 for serving a writ not otherwise listed in this article;
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> (5) $10 for taking and approving a bond and, if necessary, returning the bond to the courthouse;
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> (6) $5 for commitment or release;
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> (7) $5 for summoning a jury, if a jury is summoned; and
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> (8) $8 for each day's attendance of a prisoner in a habeas corpus case if the prisoner has been remanded to custody or held to bail.

Id. art. 102.011(a). In addition to those fees, the provision also authorizes a court to charge a defendant "29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service," including conveying a prisoner and "traveling to execute criminal process, to summon or attach a witness, and to execute process not otherwise described by this article." *Id.* art. 102.011(b); *see also id.* art. 102.011(c)-(e), (i) (allowing for imposition of additional fees for services provided by law-enforcement personnel).[2]

When presenting this issue, Whary acknowledges that the Code of Criminal Procedure authorizes the imposition of sheriff's fees in varying amounts, *see id.* art. 102.011, but notes that there is no provision authorizing the imposition of a specific $25 fee and urges that sheriff's fees in the amount of $25 are being "routinely" imposed "regardless of the factual basis in the record in a particular case." In addition, Whary contends that most of the provisions listed above do not apply in this case because "no bond was issued," because "no witnesses were summoned," because "no jury trial was held," because "this is not a habeas case," because she "was not arrested pursuant to a warrant," and "because the record does not contain any" evidence of "any commitment" or release. In fact, she asserts that only two provisions could apply in this case. Specifically, she suggests that the imposition of a $5 fee would have been appropriate because she was arrested without a warrant,

[2] On appeal, Whary notes that article 102.001 of the Code of Criminal Procedure also authorizes the imposition of sheriff's fees but argues that the provision "does not apply to this case, and arguably does not apply to any defendant's case." Given our resolution on appeal, we need not decide whether article 102.001 applies in this case, but we do note that we recently explained that the deletion of various subarticles of the statute have rendered the viability of the remaining portions questionable because the remaining portions refer to and in some cases rely on the deleted subarticles." *See Love v. State*, No. 03-15-00462-CR, 2016 WL 1183676, at *1 n.1 (Tex. App.—Austin Mar. 22, 2016, no pet.) (mem. op., not designated for publication).

see id. art. 102.011(a)(1), and that she could have been assessed a fee for mileage for being transferred from jail to the courthouse, *see id.* art. 102.011(b)(1). Regarding the mileage fee, Whary encourages this Court to "take judicial notice of the locations of the Bell County jails and their distances from the Bell County Courthouse" and conclude that she owes, at most, $0.87 for mileage. Accordingly, Whary urges that there is no basis for the imposition of the $25 sheriff's fee and asks this Court to reduce the amount of that fee.

Recently, we considered an appeal from the same county presenting similar complaints about the imposition of a $25 sheriff's fee and upheld the imposition of the fee because the applicable statute "authorizes fees for law-enforcement personnel," because the statute "allows for the imposition of more than one fee," and because the fee "at issue . . . generally fall[s] within the range of permissible fees." *See Love v. State*, No. 03-15-00462-CR, 2016 WL 1183676, at *2 (Tex. App.—Austin Mar. 22, 2016, no pet.) (mem. op., not designated for publication). Moreover, we observed that "although the bill of costs [did] not provide an itemized account of how the $25 amount was determined," this Court had not been pointed to any "authority requiring that type of itemization." *Id.*; *see also* Tex. Code Crim. Proc. art. 103.009 (obligating "[e]ach clerk of a court, county judge, justice of the peace, sheriff, constable, and marshal [to] keep a fee record"); *Penright v. State*, 477 S.W.3d 494, 501 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (explaining that "Sheriff's fee record" need not be included in appellate record). Further, we noted that although the defendant insisted that only certain sheriff's fees applied and that those fees did not add up to $25, the record indicated that two additional sheriff's fees applied and could "have both served as a basis for a fee." *Love*, 2016 WL 1183676, at *2 (citing provisions authorizing imposition of $35 fee

and $50 fee); *see also Martinez*, 510 S.W.3d at 209 (overruling issue regarding sheriff's fees and concluding that record arguably provided basis for imposition of $255 in sheriff's fees where record showed that there were "five instances of serving capias," which allows for imposition of $50 fee each time, and that defendant was also arrested without warrant, which allows for imposition of $5 fee).

As in *Love*, the bill of costs lists a $25.00 sheriff's fee but does not further set out how that amount was determined. But, as explained in *Love*, sheriff's fees are statutorily authorized, and the statute authorizes the imposition of more than one type of sheriff's fee. *See* Tex. Code Crim. Proc. art. 102.011. Moreover, like the fee at issue in *Love*, the sheriff's fee here falls within the range of permissible fees, and the record supports the imposition of fees beyond those that Whary concedes could have been applied and beyond what the district court imposed. *See Love*, 2016 WL 1183676, at *2. In particular, the record contains a capias along with the sheriff's affidavit indicating that the capias was executed as part of the motion to revoke Whary's probation, which could have served as a basis for the imposition of a sheriff's fee greater than the amount listed in the bill of costs. *See* Tex. Code Crim. Proc. art. 102.011(a)(2) (allowing for imposition of fee of "$50 for executing or processing a[] . . . capias").[3] If the district court elected to impose as a sheriff's fee an amount that was less than the amount statutorily authorized, that would not seem to warrant a determination

[3] In addition, Whary acknowledges on appeal that the record contains a "Precept to Serve" showing that a sheriff was required to serve Whary with a copy of her motion to revoke probation and that the sheriff did complete the task and further acknowledges that the "Precept to Serve" could have served as a basis for a sheriff's fee but speculates that the district clerk may have "declined to assess the fee." *See* Tex. Code Crim. Proc. art. 102.011(a)(4) (authorizing imposition of fee of "$35 for serving a writ not otherwise listed in this article").

that the amount of the fee should be even further reduced.[4] Finally, in resolving this issue we must be aware of the presumption of regularity in trial proceedings, and we observe that nothing in the record presented to this Court persuades us that the presumption should not apply to the fee imposed and listed in the bill of costs. *Cf. Leon v. State*, 25 S.W.3d 841, 843 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (stating that "[a]bsent any showing to the contrary, we assume regularity in the proceedings").

For all of these reasons, we overrule Whary's first issue on appeal.

Error in Judgment

In her second issue on appeal, Whary asserts that "[t]he judgment does not correctly specify the statute for the offense, and should be reformed accordingly." When presenting this argument, Whary notes that the judgment lists "'22.04 Penal Code' only" as the "Statute for

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[4] In this case, Whary urges that our opinion in *Love* was incorrectly decided. More specifically, Whary contends that the opinion in *Love* allows for the imposition of a sheriff's fee "even if the facts do not authorize the amount actually assessed, so long as the amount imposed falls somewhere within the range that is authorized by the statute," which Whary asserts is inconsistent with the requirement that there be "a basis for the cost," *see Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014), and with the statutory language prohibiting the imposition of a sheriff's fee "for a service not performed or for a service for which a cost is not expressly provided by law," *see* Tex. Code Crim. Proc. art. 103.002; *see also* Tex. Gov't Code § 51.608 (providing that "the amount of a court cost imposed on the defendant in a criminal proceeding must be the amount established under the law in effect on the date the defendant is convicted of the offense"). Although it is true that in *Love* this Court upheld the imposition of a sheriff's fee in an amount that did not specifically line up with one of the fees listed in article 102.011 of the Code of Criminal Procedure but did fall within the range of fees listed in the statute, our holding was limited by the fact that the statute authorizes the imposition of more than one type of sheriff's fee that can be added together and by the fact that the record provided a basis for the imposition of fees in excess of the fee complained of on appeal. *See* 2016 WL 1183676, at *2. Accordingly, we do not agree with Whary's expansive reading of the analysis from *Love*.

Offense." Although Whary acknowledges that section 22.04 generally governs the offense of "Injury to a Child, Elderly Individual, or Disabled individual," *see* Tex. Penal Code § 22.04, Whary observes that the indictment in this case alleged that she "committed the offense by an omission that caused bodily injury to a child for whom, as the parent, she had the duty to act." Accordingly, Whary insists that the "Statute for Offense" "is incomplete, and therefore incorrect" and should be reformed to reflect the subsection pertaining to bodily injury, *see id.* § 22.04(a)(3), and the subsection setting out when an omission can be an offense, *see id.* § 22.04(b)(1), and to include the subsection explaining that the offense at issue is a third-degree felony, *see id.* § 22.04(f).

Regarding what information must be included in a judgment, the Code of Criminal Procedure requires, among other things, that judgments include "[t]he offense or offenses for which the defendant was convicted" and "the degree of offense for which the defendant was convicted." Tex. Code Crim. Proc. art. 42.01, § 1(13), (14). As set out above, the district court's judgment states that Whary was convicted of injury to a child under section 22.04 of the Penal Code. The statute provides that "[a] person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury." *See* Tex. Penal Code § 22.04(a). Moreover, although the indictment in this case alleged that Whary committed the crime by omission and although subsection 22.04(b) provides that an omission constitutes an offense "if . . . the actor has a legal or statutory duty to act," *see id.* § 22.04(b)(1), nothing in the statute indicates that injury to a child by omission is a different offense than injury to a child by act. In addition, while it is true that various

subsections of section 22.04 set out different offense levels depending on the nature of the conduct at issue, *see id.* § 22.04(e)-(g), the judgment in this case correctly reflects that the offense was a third-degree felony, *see id.* § 22.04(f). Accordingly, the judgment in this case sets out the offense for which Whary was convicted, the statute governing the offense, and the degree of the offense and, therefore, seems to satisfy the statutory requirements. *See McKinley v. State*, Nos. 10-14-00202—00203-CR, 2015 WL 4064719, at *2 (Tex. App.—Waco July 2, 2015, pet. ref'd) (mem. op., not designated for publication) (determining that statutory requirements for judgment were met where judgment stated that defendant "was convicted under section 21.11 of the Penal Code of the offense of indecency with a child, a second degree felony enhanced to first degree felony—habitual offender" and overruling issue asserting that judgment should be reformed to "reflect the statute giving rise to the enhanced punishment—section 12.42(d) of the Penal Code"). *But see Edwards v. State*, No. 07-16-00265-CR, 2017 WL 461680, at *2 (Tex. App.—Amarillo Jan. 30, 2017, no pet.) (mem. op., not designated for publication) (determining that judgment should be reformed to modify statute for offense from section 30.02 of Penal Code, which generally governs burglaries, to subsections 30.02(a)(3) and (c)(2) because "inclusion of the subsections" more accurately described "the offense of which Appellant was convicted" where appellant was charged with intentionally or knowingly entering habitation).

In addition, none of the cases relied on by Whary in her brief demonstrate that it is error for a judgment to generally list the applicable statute rather than specifically state which particular subsection or subsections apply. *See, e.g.*, *Abney v. State*, No. 03-15-00421-CR, 2016 WL 3361177, at *3 (Tex. App.—Austin June 10, 2016, no pet.) (mem. op., not designated for

publication) (modifying judgment for aggravated assault to reflect that "'Statute for Offense' is '22.02(a)(2), (b)(2)(B) Penal Code'" where judgment originally only listed "'22.02(b)(2)(B) Penal Code,'" which set out offense level but not elements of offense, and modifying judgment for evading arrest or detention "to reflect that the 'Statute for Offense' is '38.04(a), (b)(1) Penal Code'" where judgment originally only listed "'38.04(b)(1),'" which set out offense level but not elements of offense); *Wright v. State*, Nos. 03-14-00468—00469-CR, 2015 WL 4609743 at *3 (Tex. App.—Austin July 28, 2015, no pet.) (mem. op., not designated for publication) (reforming judgment to correct clerical error where defendant was convicted of theft but "'Statute for Offense'" portion of judgment listed section 30.02 of Penal Code, which governs burglary).

For these reasons, we overrule Whary's second issue on appeal.

CONCLUSION

Having overruled both of Whary's issues on appeal, we affirm the district court's judgment adjudicating guilt.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

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