NUMBER 13-23-00221-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

TRAVIS JOHN ALVAREZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

ON APPEAL FROM THE 24TH DISTRICT COURT OF JACKSON COUNTY, TEXAS

MEMORANDUM OPINION

Before Justices Longoria, Silva, and Peña
Memorandum Opinion by Justice Peña

Appellant Travis John Alvarez appeals the assessment of attorney's fees in his judgment of conviction for driving while intoxicated (DWI), third or more, a third-degree felony. *See* TEX. PENAL CODE ANN. § 49.09(b). After a jury found Alvarez guilty, the trial court found a separate enhancement paragraph to be "true," enhancing the offense to a second-degree felony, and sentenced Alvarez to twenty years' imprisonment. *See id*.

§ 12.42(a). The judgment of conviction assessed attorney's fees against Alvarez in the amount of $6,300, for a total of $7,146 in reimbursement fees. In one issue, Alvarez argues that the trial court erred in assessing attorney's fees against him because he was previously found to be indigent. We affirm the judgment as modified.

I. BACKGROUND

In a one-count indictment, Alvarez was charged with DWI, third or more. *See id.* § 49.09(b). An enhancement paragraph further alleged that prior to the commission of the instant DWI, Alvarez had been convicted of felony aggravated assault. *See id.* § 22.02. The trial court appointed Alvarez defense counsel by filling in and signing a single-page form document, which included an affidavit of indigency in the top portion, and an order of appointment at the bottom portion. The affidavit of indigency portion of the document provides as follows: "I certify that I am without means to employ counsel of my own choosing and I hereby request the Court to appoint counsel for me," and includes blank spaces for a defendant to provide information on "[i]ncome," "reasonable monthly living expenses," "property owned," and "[d]ebts," among other information. This portion of the document concludes with a signature line for the defendant to sign, and a signature line for a notary to certify the affidavit. Alvarez did not fill in any information on the affidavit of indigency portion of the form, did not sign the form, and the form was not certified by a notary.

After a jury found Alvarez guilty, the trial court found the enhancement paragraph to be "true," and sentenced him to twenty years' imprisonment. *See id*. § 12.42(a) (permitting a third-degree felony to be punished as a second-degree felony if a defendant has been previously finally convicted of an applicable felony). The judgment of conviction

includes a special finding assessing attorney's fees against Alvarez in the amount of $6,300.[1] The trial court did not make an oral pronouncement regarding this special finding during sentencing and did not make any express written or oral findings regarding the assessment of attorney's fees against Alvarez. This assessment is not included in the bill of costs. Alvarez was subsequently appointed appellate counsel and signed a corresponding affidavit of indigency with the appointment order. Alvarez did not file a motion for new trial. This appeal followed.

II. STANDARD OF REVIEW & APPLICABLE LAW

Attorney's fees, like court costs, are compensatory and non-punitive. *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). Attorney's fees may be assessed against a defendant as reimbursement for legal services provided by defense counsel, and they may be assessed whether the defendant is convicted or not. *Id*. "Because attorney fees are akin to court costs, we apply the same rules to attorney fees that we apply to court costs." *Id*.; *see Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009) (holding that court costs "did not have to be included in the oral pronouncement of sentence" to be enforced).

After finding a defendant to be indigent by considering certain enumerated factors, *see* TEX. CODE CRIM. PROC. ANN. art. 26.04(m), a trial court has the authority to assess attorney's fees against a defendant as reimbursement for legal services provided. *See id.* § 26.05(g). The Texas Code of Criminal Procedure (the Code) provides as follows:

> If the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant in accordance with Article 1.051(c) or (d),

[1] The final appealable judgment of conviction in this case is a judgment nunc pro tunc, which corrected a previous judgment that included an incorrect case number.

> including any expenses and costs, the judge shall order the defendant to pay during the pendency of the charges or, if convicted, as a reimbursement fee the amount that the judge finds the defendant is able to pay.

Id.; *see id*. § 1.051(c) (providing for the appointment of counsel for an indigent defendant at the trial court level), (d) (providing for the appointment of counsel for an indigent defendant for certain enumerated appellate and postconviction matters). Further,

> A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or non[-]indigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

Id. § 26.04(p); *see also id*. § 26.04(c) (providing that the trial court "shall appoint" counsel if it "determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in the proceeding").

A defendant may challenge the sufficiency of the evidence to support an assessment of attorney's fees in the written judgment for the first time on appeal, and such claim need not be preserved by trial objection. *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (noting that "the defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees"). The applicability of *Mayer* has been subsequently limited to complaints of insufficient evidence under Article 26.05(g) specifically. *See Garcia v. State*, 663 S.W.3d 92, 97 (Tex. Crim. App. 2022) (declining to extend *Mayer* to the preservation of sufficiency claims complaining of the imposition of restitution fees

under Article 42.037(c)); *see also Dissette v. State*, No. 09-11-00672-CR, 2012 WL 1249014, at *2 (Tex. App.—Beaumont Apr. 11, 2012, no pet.) (mem. op., not designated for publication) (declining to extend *Mayer* to the preservation of sufficiency claims complaining of the imposition of court costs under Texas Government Code § 102.021).

Under *Mayer*, we review the record to determine whether the trial court could have reasonably determined that a material change in the defendant's financial circumstances occurred. *See McFatridge v. State*, 309 S.W.3d 1, 6 (Tex. Crim. App. 2010) (noting that "an appellate court can uphold a trial court's determination of non-indigence only if the record contains evidence supporting such a determination") (quoting *Whitehead v. State*, 130 S.W.3d 866, 874 (Tex. Crim. App. 2004)); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (providing that a prior finding of indigency creates a presumption of indigency that runs throughout the case). To impose attorney's fees on a defendant, "the trial court [must] find, either expressly or implicitly, that a material change occurred and [the defendant] has the ability to pay . . . for his court-appointed attorney's fees." *Dieken v. State*, 432 S.W.3d 444, 449 (Tex. App.—San Antonio 2014, no pet.) (citations omitted). Where the trial court does "not make an express written or oral finding," "we must determine whether the evidence reasonably supports such an implicit finding." *Id*. (citations omitted).

When interpreting a statute, "we adhere to our cardinal rule of statutory construction: [w]e interpret a statute in accordance with the plain meaning of its language, unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended." *Griffith v. State*, 166 S.W.3d 261, 262 (Tex. Crim. App. 2005) (citation omitted); *see also Combs v. Health Care Servs. Corp*., 401

S.W.3d 623, 629 (Tex. 2013) ("If a statute is worded clearly, we must honor its plain language, unless that interpretation would lead to absurd results."). "In statutory interpretation, we try to give effect to the whole statute, which includes each word and phrase, if possible." *Id.* (citation omitted); *see also Castelman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018) (per curiam) (noting that statutory language must be analyzed in its context, considering both the specific sections at issue and the statue as a whole); *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018) (noting that we must read statutes "contextually to give effect to every word, clause, and sentence").

III. DISCUSSION

A. Preservation of Error

It is undisputed that the only evidence to support a finding of indigency prior to sentencing is the single-page form document which includes the order appointing defense counsel. There is no transcript to accompany the order of appointment, and no motion for new trial was filed nor any other action taken to supplement the record to help us determine whether the trial court's appointment of counsel was predicated on an indigency finding. Because no objection was made to the trial court as to the assessment of attorney's fees, we must first determine whether Alvarez has failed to preserve his objection, or whether he may complain of the assessment of attorney's fees against him for the first time in this appeal. *See Mayer*, 309 S.W.3d at 556.

The State argues that, because there is no evidence that the trial court found Alvarez to be indigent before imposition of his sentence, *Mayer* is not applicable, and we must deny his claim as error was not preserved. *See id*. In particular, the State points to

the following language in Article 26.04(c):

> Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent *or that the interests of justice require representation of a defendant in the proceeding*, the court or the courts' designee shall appoint one or more practicing attorneys to represent the defendant in accordance with this subsection and the procedures adopted under Subsection (a).

TEX. CODE CRIM. PROC. ANN. art. 26.04(c) (emphasis added); *see id*. § 26.04(a) (providing that courts trying criminal cases "shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for, charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony"); *id*. § 26.04(b) (setting out conditions for implementation of a countywide appointment system, including the limitation that such procedures "authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county," and "ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings").

According to the State, because Alvarez did not complete or sign the affidavit of indigency in the portion of the form document appointing counsel, we must presume that the trial court appointed him defense counsel as a *non-indigent* defendant pursuant to the "interests of justice" language in Article 26.04(c). As such, the appointment of counsel would not be one under Article 26.05(g), and the *Mayer* preservation rule would not apply.

See Garcia, 663 S.W.3d at 97 (noting that *Mayer* is restricted to cases where there was an underlying appointment order under Article 26.05(g)).

While this reading of the statute is plausible, it does not accord with the Code as a whole. *See Griffith*, 166 S.W.3d at 262. For example, Article 1.05 provides as follows: "[a]n indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement *and in any other criminal proceeding if the court concludes that the interests of justice require representation*." TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (emphasis added). There is no plausible reading of Article 1.051(c) that would make it applicable to non-indigent defendants; the subject of the sentence is "[a]n indigent defendant," and the entire sentence must be read in that context. *Id*.; *see Griffith*, 166 S.W.3d at 262 (noting that we must "give effect to . . . each word and phrase" in a statute); *see also Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 547 (Tex. 2021) (rejecting a party's interpretation of a statute that would "disregard[] the structure of the sentence as a whole" because such an interpretation would allow for a disjunctive reading that would restrict the subject of the sentence to the initial clause to the exclusion of the second, and where there was "no grammatical indication" that the subject of the sentence would not also apply to the second clause). Further, Article 26.04(c) explicitly refers to subsection (a), which authorizes appointment of counsel "*for an indigent defendant* in the county," *id*. § 26.04(a) (emphasis added), and subsection (b), which provides conditions for a countywide appointment system "*for indigent defendants* in the county." *Id*. § 26.04(b) (emphasis added).

The more harmonious reading is that Article 26.04(c) mirrors Article 1.051(c) in content; both stand for the proposition that a trial court can appoint counsel for an indigent defendant in a criminal proceeding either (i) when the proceeding may result in confinement (i.e., a misdemeanor or felony prosecution), or (ii) in any other proceeding where the interests of justice require representation. *See* TEX. CODE CRIM. PROC. ANN. arts. 1.051(c), 26.04(c)[2]; *see also Hegar v. Am. Multi-Cinema, Inc.*, 605 S.W.3d 35, 41 (Tex. 2020) (noting that we "will not give an undefined statutory term a meaning that is out of harmony or inconsistent with other provisions in the statute," and that if "a different, more limited, or precise definition is apparent from the term's use in the context of the statute, we apply that meaning") (citations omitted).

This reading is supported by statements made by the Court of Criminal Appeals. After finding that a contemnor is entitled to representation by counsel in contempt proceedings, the court in *Ex parte Gonzales* further concluded that "a defendant must be informed of his right to representation, and *if found indigent*, his right to appointment of counsel." 945 S.W.2d 830, 837 (Tex. Crim. App. 1997) (emphasis added). In reaching its conclusion in *Ex parte Gonzales*, the majority noted that "[t]he State *correctly* asserts that applicant was not entitled to have an attorney appointed to represent her until such time as the court determined that she was indigent." *Id*. (emphasis added). A concurring opinion by Justice Keller emphasized this point when she argued that the applicant was not entitled to relief because the basis of her claim was that she had not been appointed

[2] A comparison of each subsection's heading supports this harmonious reading, with Article 1.051, a general provision of the Code, enumerating the "[r]ight to representation of counsel," and Article 26.04, located under the chapter on "[a]rraignment," detailing the "[p]rocedures for appointing counsel," and otherwise implementing the right enumerated in Article 1.051(c). *See* TEX. CODE CRIM. PROC. ANN. arts. 1.051, 26.04.

counsel, not that she had not been notified of her right to counsel, and that "[s]ince the majority, as I understand it, accepts the trial court's finding that applicant was not indigent, applicant's claim should fail—the court was not required to appoint counsel to a non-indigent." *Id*. at 839 (Keller, J., concurring and dissenting).

In short, only an indigent defendant has the right to the *appointment* of counsel. *See id*. at 837. While both indigent and non-indigent defendants are "entitled to be represented by counsel in an adversarial judicial proceeding," TEX. CODE CRIM. PRO. ANN. art. 1.051(a), only an "indigent defendant is entitled to have an attorney *appointed* to represent him[.]" *Id*. § 1.051(c) (emphasis added); *cf. In re E.R.W.*, 528 S.W.3d 251, 261 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (noting that under Texas Family Code § 107.013 a non-indigent parent in a termination suit has a statutory right to representation of counsel, but only an indigent parent has the right to "appointed" counsel) (citing TEX. FAMILY CODE. ANN. § 107.013(a)).[3] Contrary to the State's reading of Article 26.04, a non-indigent defendant is not entitled to the appointment of counsel merely because "the interests of justice require representation of a defendant in the proceeding[.]" *Id*. § 26.04(c).[4]

[3] This distinction between indigent defendants who are entitled to the appointment of counsel and non-indigent defendants who are only entitled to the representation of counsel is further supported by the ten-day waiver provision found in Article 1.051. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(e). This provision distinguishes between a "non[-]indigent defendant [who] appears without counsel at a proceeding after having been given a reasonable opportunity to retain counsel," and "an indigent defendant who has refused *appointed counsel* in order to retain private counsel[.]" *Id*. (emphasis added).

[4] The State's reading of Article 26.04 leads to absurd results. *See Griffith v. State*, 166 S.W.3d 261, 262 (Tex. Crim. App. 2005) (noting that we cannot interpret statutory language according to its plain meaning if doing so would lead to absurd results). The State's reading would empower a trial court to appoint counsel to non-indigent defendants at its discretion, so long as the court found that the "interests of justice require representation[.]" TEX. CODE CRIM. PROC. ANN. art. 26.04(c). The recoupment of costs would then be subject only to the trial court's further discretionary determination that "a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided[.]" *Id*. § 26.05(g). Further, Article 26.05 provides that when assessing a defendant's financial resources and ability to pay when determining whether a defendant can offset the costs of legal services

Nor can the State argue that even though the trial court is not *required* to appoint counsel to a non-indigent defendant, the trial court may nevertheless appoint defense counsel to a non-indigent defendant on some other basis and later recoup the costs of the legal services provided. See *Id*. § 26.05(g). By its terms, Article 26.05(g) permits recoupment of costs from a defendant only when legal services are provided "in accordance with Article 1.051(c) or (d)," both of which apply only to indigent defendants. As the Court of Criminal Appeals noted in *Gray v. Robinson*, interpreting the Code provisions related to the appointment and compensation of counsel,

> Notice of indigency is a requirement that pervades the statutory scheme, and, likewise, the active, discretionary determination of the court is heavily relied upon for the appointment of counsel. There is no duty imposed on the trial court to appoint counsel until the defendant shows that he is indigent. The indigency determination is to be made on a case-by-case basis as of the time the issue is raised and not as of some prior or future time. . . . The trial court has no duty to appoint counsel where an indigent defendant has managed to retain counsel or where the defendant has made no showing of indigency. Thus, from the statutes governing the appointment of counsel to indigents emanates a body of caselaw reinforcing the requirements of when and how counsel shall be appointed. These requirements are evidence of the importance placed on notice and formal appointment. *Counsel is to be appointed only when indigency is shown and it follows that prior to such a showing counsel is not to be appointed or compensated by the State*.

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provided, "the [court] *may only consider* the information . . . [it] is authorized to consider in making an indigency determination under Article 26.04(m)." *Id*. § 26.05(g-1)(4) (emphasis added). Because the trial court is not *obligated* to consider the information under Article 26.04(m), the State's reading would empower a trial court to appoint counsel to a non-indigent defendant at the county's expense, and further permit the trial court to order that the county bear the entire cost of the legal services provided, despite the non-indigent defendant's ability to offset such costs. Such a result would be inconsistent with the Code as a whole. *See Gray v. Robinson*, 744 S.W.2d 604, 606 (Tex. Crim. App. 1988) (noting that the Code provisions regarding the compensation of appointed counsel "have been consistently construed according to their clear, unambiguous and strict mandates, which is in keeping with the tight budgetary limitations of this State"). As one commentator has noted, if the trial court determines that a defendant has resources that enable him to offset "in whole" the costs of legal representation, "the defendant should not be found indigent and counsel should not be appointed." 42 George R. Killam, Jr., *Texas Practice Series: Criminal Practice & Procedure* § 29:43 (3d ed.) (opining that "[p]erhaps [§ 26.05(g)] is intended to authorize after-the-fact reimbursement of the county").

744 S.W.2d 604, 607 (Tex. Crim. App. 1988) (cleaned up) (emphasis added). Regardless of the mechanism used to authorize the appointment of counsel to a defendant, indigent or otherwise, *Gray* makes clear that a finding of indigency is a condition precedent for the State to compensate an attorney. *See Id*. Accordingly, to render Article 26.04(c) harmonious with the statutory scheme, we must read the Article as authorizing the appointment of counsel only upon a finding of indigency. *See* TEX. CODE CRIM. PRO. ANN. art. 26.04(c) (requiring that the appointment of counsel be in accordance with the procedures set out in subsection (a)); *Id*. § 26.04(a) (noting that any such procedures must be consistent with Article 1.051); *Id*. § 1.051(c) (providing that an "*indigent defendant* is entitled to have an attorney appointed to represent him," and that a court "authorized under Article 26.04 to appoint counsel *for indigent defendants* in the county . . . shall appoint counsel as soon as possible") (emphasis added).

The order of appointment clearly and unambiguously states that counsel "is hereby appointed to represent [Alvarez] in this cause." The judgment of conviction assessed "[c]ourt appointed attorney fees" against Alvarez. The State points to no other Code provision or statute that would authorize this assessment other than Article 26.05(g). *See Id*. § 26.05(g). Accordingly, *Mayer* is applicable and we conclude that Alvarez is allowed to argue for the first time on appeal that there was insufficient evidence to show he had the requisite financial resources and ability to pay for attorney's fees. *See Mayer*, 309 S.W.3d at 556; *Garcia*, 663 S.W.3d at 97 (noting that "*Mayer* was undergirded by Texas Code of Criminal Procedure Article 26.05(g)"); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (noting that a prior finding of indigency creates a presumption that runs throughout the case).

B. Propriety of Attorney's Fees

Having found that *Mayer* is applicable, we review the record to determine whether the trial court could have reasonably determined that there had been a material change in Alvarez's financial circumstances to warrant the assessment of attorney's fees against him. *See McFatridge*, 309 S.W.3d at 6; TEX. CODE CRIM. PROC. ANN. art. 26.04(p). Nothing in the record supports a finding that there was a material change in Alvarez's financial circumstances from the time that counsel was appointed until the time he was sentenced. Nor does the State argue that the record supports such a finding assuming that there had been a prior finding of indigency.

Further, the trial court appointed Alvarez appellate counsel, and Alvarez signed an affidavit wherein he stated that he is "a penniless, destitute indigent person too poor to pay for or give security for the statement of facts and a true copy thereof in this cause, which instruments are necessary in the preparation and presentation of my appeal before the Court of Criminal Appeals of Texas." Alvarez's appellate affidavit of indigency was filed *before* the judgment of conviction was entered, and the trial court did not orally pronounce its assessment of attorney's fees against Alvarez at sentencing. *See Dieken*, 432 S.W.3d at 449 (noting that we must determine whether evidence reasonably supports an implicit finding that a material change in financial circumstances has occurred, and the defendant had the ability to pay, where there are no express written or oral findings). It would make no sense to suggest that there was evidence of a material change in Alvarez's financial circumstances where the trial court appointed him appellate counsel based on an affidavit of indigency signed before the assessment of attorney's fees against him.

Accordingly, we conclude that the trial court's implicit determinations that a material change in Alvarez's financial circumstances occurred after the appointment of trial counsel, and that he was able to pay the $6,300 in court-appointed attorney's fees, were not reasonably supported by the evidence. *See id*. (finding sufficient evidence of a material change in financial circumstances and ability to pay where there was evidence that an appellant, who was previously found to be indigent, testified that "he had a 401(k) account he was trying to liquidate," "he might receive funds from an insurance claim," and where retained counsel "stated on the record in open court that [appellant] hired him"); *see also Gilmer v. State*, No. 12-23-00054-CV, 2023 WL 8103957, at *2 (Tex. App.—Tyler Nov. 21, 2023, no pet.) (mem. op.) (not designated for publication) (finding insufficient evidence to support the imposition of attorney's fees against an appellant where there was "no direct proof that the trial court determined [a]ppellant was indigent at the time of trial," but where the judgment of conviction assessed court-appointed attorney's fees against appellant, reasoning that "[b]ecause counsel may be appointed only when indigency is shown, we presume that the trial court determined [appellant] was indigent before appointing counsel," and where there were "no facts in the record to support a finding that, since the court made its initial indigency finding, [appellant]'s financial circumstances materially changed"). We sustain Alvarez's sole issue.

IV. REFORMATION OF JUDGMENT

An intermediate appellate court may reform a trial court's judgment to make the record speak the truth when it has the necessary data and information to do so. *See* TEX. R. APP. P. 43.2(b) (authorizing appellate courts to modify the judgment and affirm as modified); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) ("[A]n appellate

court has authority to reform a judgment to include an affirmative finding to make the record speak the truth."). We modify the trial court's judgment to delete the $6,300 amount assessed against Alvarez as "[c]ourt appointed attorney fees" in the "special findings" portion of the judgment. We further modify the judgment to subtract the attorney's fees assessed against defendant under the entry for "Reimbursement Fees" to reflect a remaining total of $846.

V. CONCLUSION

We affirm the trial court's judgment as modified.

L. ARON PEÑA JR.
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed on the
18th day of April, 2024.