Affirmed as Modified; Opinion Filed November 14, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01370-CR
No. 05-16-01371-CR
No. 05-16-01372-CR

JUAN MAREZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-14-15551-P, F-16-75271-P, & F-16-51966-P

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Lang

In three separate trial court cases, appellant Juan Marez waived his right to a jury trial and pleaded guilty without a plea agreement respecting punishment to the offenses of aggravated assault causing serious bodily injury, aggravated assault with a deadly weapon, and abandoning or endangering a child.[1] Following a consolidated hearing, the trial court convicted appellant of all three offenses and assessed punishment at twenty years' confinement in the aggravated assault causing serious bodily injury case, ten years' confinement in the aggravated assault with

[1] Those three cases were trial court cause numbers F-14-15551-P, F-16-51966-P, and F-16-75271-P, respectively, which correspond respectively to cause numbers 05-16-01370-CR, 05-16-01371-CR, and 05-16-01372-CR in this Court.

a deadly weapon case, and two years' confinement in the abandoning or endangering a child case.

In two issues on appeal, appellant contends (1) the trial court erred by overruling his objection to the State's closing argument and (2) "[t]he trial court's cumulation order was insufficient regarding specificity of the previous conviction." We decide against appellant on his two issues.

We affirm the trial court's judgment in trial court cause number F-16-75271-P. Additionally, we modify the trial court's judgments in trial court cause numbers F-14-15551-P and F-16-51966-P and affirm those judgments as modified.

I. FACTUAL AND PROCEDURAL CONTEXT

At the consolidated hearing on appellant's open pleas described above, the State presented the testimony of Anacleto Ramirez. Through an interpreter, Ramirez testified he is the brother of appellant's stepfather, Emillio Ramirez ("Emillio"). Ramirez stated that in June 2014, he was visiting the home of Emillio and Emillio's wife, Marvia, who is appellant's mother. Appellant arrived with two male friends. Appellant asked Marvia for money, but she did not give him any. According to Ramirez, at that point, appellant "started to fight Emillio." When Ramirez tried to stop the fight, appellant hit him in the face. Ramirez testified his eye was severely damaged and he now has a "fake eye" as a result of that assault by appellant.

Appellant testified he was sixteen at the time of the incident described by Ramirez and is currently nineteen. He has two children with his girlfriend, a one-year-old daughter and a two-month-old son. Also, he has a two-year-old "stepdaughter." He stated that when he was fourteen, his "real father" abandoned him and his family. When appellant's mother subsequently married Emillio, appellant "was heartbroken due to another person trying to take my father's place" and "had a lot of anger." Appellant stated he had "juvenile records" for "assaultive offenses" starting

in 2011 and "a lot of them had to do with [Emillio]." According to appellant, "[M]e and my stepfather were trying to get along with each other and anytime he confronted me about something was due to the fact that he was drunk. . . . Every confrontation we had was due to him drinking alcohol, and it led to me and him getting into altercations." Appellant stated that when his stepfather wasn't drinking, the two of them were "pretty cool."

Appellant testified that while he was "in juvi," he was diagnosed as "bipolar" and was provided with medications. After he "got out of juvi," he went to live with his grandmother and was not able to arrange to see a doctor and continue with his medications. He stated that during the time he has been in jail pursuant to the cases in question, he has not been involved in any fights or "been written up" and has been taking classes respecting parenting, substance abuse, and anger management. He stated he is "trying to better myself to be a better person and a better father."

On cross-examination, appellant testified that his altercations with Emillio resulted in his arrest only. Emillio was not arrested. Further, appellant stated that during the incident that gave rise to the charge of aggravated assault with a deadly weapon described above, he swung a hammer at his girlfriend and his three-month-old daughter while he was intoxicated.

During closing argument, appellant's trial counsel stated in part "to have a stepdad come in, even though he tried to help the family, it still wasn't [appellant's] dad and then when [Emillio] would get intoxicated, then that's when they would have their issues." Further, during the State's closing argument, the following exchange occurred:

> [PROSECUTOR]: . . . [Appellant] makes his victims women and children and family and people that are close to him.
>
> Again, like I said, it's no wonder that he is—has not been a problem back here in the tanks. He doesn't know those people. He's a bully to those that know and love and try to assist him.
>
> He is in a situation wherein which, yes, he was angry because his father abandoned him. However, in this situation, someone stepped in to try to assist him, and the things that this person got was constant disrespect and whatnot. And

> if his stepfather was as awful and horrible as he was, I don't understand how twice, as a young boy, 12 and 13, he was arrested and not his stepfather in the situation, who happens to be here present in the courtroom today.
>
> THE COURT: Who happens to be in the courtroom?
>
> [PROSECUTOR]: His stepfather, Mr. Emillio Ramirez, he's here. This has been an issue for this family since—
>
> [DEFENSE COUNSEL]: Your Honor, I'm sorry. I'm going to have to object if she's going to start talking about things when she didn't bother to call any other witnesses. And if we want to go to a full blown why he acted the way he did and why his father was drinking—
>
> THE COURT: Overruled. Overruled. Stick to the argument.

Following the parties' closing arguments, the trial court stated to appellant, in part,

> I feel like that you are definitely someone that would tell me anything you think I want to hear. And I saw you up there when you were asked questions, I saw you, I see your anger. I can't leave you on the streets.
>
> . . . In Cause Number F16-51966, I'm going to sentence you to ten years confinement in the Texas Department of Criminal Justice. And in Cause Number F14-15551, I'm going to sentence you to 20 years confinement in the Texas Department of Criminal Justice. These cases are to run consecutively. That means 30 years. That means you will not be eligible for parole until you are—15 years from today.
>
> And let me tell you why I did that, because two of your children will be 17 years old then and they can decide whether or not they want to be with you, not you with them. I don't want you around those kids. . . . I'm not going to have anyone on the street that puts a guy's eye out and causes him to not even have an eye and to have a hammer where your kids are involved.

The trial court signed judgments dated November 14, 2016, in all three cases. The judgments in trial court cause numbers F-16-51966-P and F-14-15551-P each contain a "cumulation order." In trial court cause number F-16-51966-P, the cumulation order states, "The Court ORDERS that the sentence in this conviction shall run consecutively and shall begin only when the judgment and sentence in the following case has ceased to operate: F14-15551-P." In trial court cause number F-14-15551-P, the cumulation order states, "The Court ORDERS that

the sentence in this conviction shall run consecutively and shall begin only when the judgment and sentence in the following case has ceased to operate: F16-51966-P."[2]

This appeal timely followed.

II. STATE'S CLOSING ARGUMENT

A. Standard of Review

A trial court's ruling on an objection to improper argument is reviewed for abuse of discretion. *See Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). "The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement." *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The test for abuse of discretion is whether the ruling was arbitrary or unreasonable. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

B. Applicable Law

The approved general areas of argument are: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) pleas for law enforcement. *See, e.g., Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Rice v. State*, Nos. 05-15-01427-CR & 05-15-01428-CR, 2017 WL 359755, at *10 (Tex. App.—Dallas Jan. 19, 2017, pet. ref'd) (mem. op., not designated for publication). "[E]rror exists when facts not supported by the record are interjected into the argument, but such error is not reversible unless, in light of the record, the argument is extreme or manifestly improper." *Rice*, 2017 WL 359755, at *10 (quoting *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008)); *accord Wesbrook*, 29 S.W.3d at 115. "Such error is non-constitutional in nature and must be disregarded if it does not affect the defendant's substantial rights." *Rice*, 2017 WL 359755, at

[2] The record shows, and the parties do not dispute, that the sentence in trial court cause number F-16-75271-P was to run concurrently with appellant's other sentences.

*10 (citing *Brown*, 270 S.W.3d at 572); *accord Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011); *see* TEX. R. APP. P. 44.2(b). In determining whether the error affected the defendant's substantial rights, we "look at the entire record of final arguments to determine if there was a willful and calculated effort on the part of the State to deprive [the defendant] of a fair and impartial trial." *Rice*, 2017 WL 359755, at *10 (quoting *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997)); *accord Wesbrook*, 29 S.W.3d at 115.

C. Application of Law to Facts

In his first issue, appellant contends "[t]he trial court erred by overruling Appellant's objection to the State arguing facts not in evidence." According to appellant,

> The State's argument was not a summation of the evidence or a reasonable inference taken from the evidence already presented, but an attempt to rebut that evidence with new evidence not admitted before the trial court. The witness referenced in the argument, Emillio Ramirez, was in the courtroom and yet the State chose not to call him to the stand to testify. Instead, the State chose to inject new facts into the record and deny Appellant his right to cross examine those facts. As such, the State's closing argument was manifestly improper mandating a new punishment hearing.

(citation to record omitted).[3]

The State responds that the trial court correctly overruled appellant's objection because the State's closing argument was proper. According to the State, "[v]iewed in context, it was in response to argument of opposing counsel, based on the evidence, and did not inject new facts into the case."

[3] In the section of his appellate brief titled "Issues Presented," appellant states his first issue as follows: "The trial court erred by admitting extraneous offense evidence without ruling whether it was proven beyond a reasonable doubt." However, elsewhere throughout his appellate brief, he states that his first issue is "[t]he trial court erred by overruling Appellant's objection to the State's closing argument." To the extent appellant's complaint respecting the admission of extraneous offense evidence can be construed as separate from his complaint respecting improper closing argument, appellant did not ask the trial court to make a determination respecting proof beyond a reasonable doubt. *See Francisco-Sanchez v. State*, No. 05-16-00012-CR, 2016 WL 8222124, at *4 (Tex. App.—Dallas Oct. 28, 2016, pet. ref'd) (mem. op., not designated for publication). "[W]ithout such a ruling, we cannot assume the trial court considered [the extraneous offense evidence] when assessing punishment." *Id*. Further, the record does not show appellant made an objection to the statements in question based on lack of a reasonable doubt determination. Therefore, appellant did not preserve error respecting such complaint. *See id*.

The record shows appellant objected to the following statement by the prosecutor respecting appellant's "altercations" with Emillio: "[Appellant's] stepfather, Mr. Emillio Ramirez, he's here. This has been an issue for this family since—." Appellant does not specifically explain what "new facts" were interjected into the record pursuant to that statement, nor does he cite any authority for his assertion that the State's argument was "manifestly improper." Moreover, even assuming without deciding that the statement in question was improper, the record shows appellant testified (1) he "had a lot of anger" at the time his mother married Emillio and (2) starting in 2011, he had "a lot" of "altercations" with Emillio and was arrested in connection with those altercations. On this record, we conclude any error by the trial court in overruling appellant's objection did not affect appellant's substantial rights and must be disregarded. *See Rice*, 2017 WL 359755, at *10; *Brown*, 270 S.W.3d at 572–73; TEX. R. APP. P. 44.2(b); *see also Mercado v. State*, No. 05-96-01807-CR, 1998 WL 470253, at *2 (Tex. App.—Dallas Aug. 13, 1998, no pet.) (not designated for publication) (no harm where alleged "new evidence" alluded to by State in closing argument was cumulative of testimony admitted without objection).

We decide appellant's first issue against him.

III. TRIAL COURT'S CUMULATION OF SENTENCES

A. Standard of Review and Applicable Law

We review a sentence imposed by the trial court for abuse of discretion. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). Under article 42.08 of the Texas Code of Criminal Procedure, a trial judge has the discretion to cumulate a defendant's sentences for two or more convictions. *Revels v. State*, 334 S.W.3d 46, 53 (Tex. App.—Dallas 2008, no pet.); *see* TEX. CODE CRIM. PROC. ANN. art. 42.08 (West Supp. 2016). Specifically, article 42.08 provides in part, "When the same defendant has been convicted in two or more cases, . . . the judgment in the

second and subsequent convictions may . . . be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate." CODE CRIM. PROC. art. 42.08(a); *see also Nicholas v. State*, 56 S.W.3d 760, 766 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) ("[W]here a defendant is found guilty in a consolidated proceeding, there need not be an exact order of the presentment of the verdicts in order to fulfill the requirements of 42.08(a)."). "[A]s a practical matter, an abuse of discretion in the context of cumulation of a defendant's sentences will be found only if the trial court imposes consecutive sentences where the law requires concurrent sentences, where the court imposes concurrent sentences, but the law requires consecutive ones, or where the court otherwise fails to observe the statutory requirements pertaining to sentencing." *Revels*, 334 S.W.3d at 54.

The Texas Court of Criminal Appeals has recommended five requirements for cumulation orders: (1) the trial court case number of the prior conviction, (2) the correct name of the court where the prior conviction was taken, (3) the date of the prior conviction, (4) the term of years of the prior conviction, and (5) the nature of the prior conviction. *Id.* (citing *Ward v. State*, 523 S.W.2d 681, 682 (Tex. Crim. App. 1975)). It is well settled that inclusion of all of the recommended elements is not mandatory. *Id.* (citing *Banks v. State*, 708 S.W.2d 460, 461 (Tex. Crim. App. 1986)); *see also Hamm v. State*, 513 S.W.2d 85, 86 (Tex. Crim. App. 1974) (cumulation order that refers only to a prior cause number is sufficient if order is entered in same court as sentence to which it is made cumulative). To be valid, a cumulation order "should be sufficiently specific to allow the Texas Department of Criminal Justice—Institutional Division . . . to identify the prior with which the newer conviction is cumulated." *Revels*, 334 S.W.3d at 54 (quoting *Ex parte San Migel*, 973 S.W.2d 310, 311 (Tex. Crim. App. 1998)).

The courts of appeals "have the authority to reform and correct cumulation orders when the necessary data is contained in the record." *Madrigal Rodriguez v. State*, 749 S.W.2d 576, 580 (Tex. App.—Corpus Christi 1988, pet. ref'd) (citing *Banks*, 708 S.W.2d at 462).

C. Application of Law to Facts

In his second issue, appellant contends "[t]he trial court's cumulation order was insufficient regarding specificity of the previous conviction." According to appellant,

> While the judgments are correct that they run consecutively, neither judgment addresses which case is to commence first. Rather, as currently written, it appears both cases commence first which would, as a practical matter, cause them to be concurrent with each other. Because of the language in the judgments, the cumulation orders are not specific enough to give both Appellant and the Department of Criminal Justice sufficient notice of the manner in which Appellant's sentences should be stacked.
>
> Furthermore, the pronouncement from the trial court was too vague regarding which case commenced first to resolve the incongruity. The trial court clearly stated the sentences were consecutive, but did not state which sentence should commence first. As such the cumulation orders are void and should be set aside.

(citations to record omitted).

The State argues the cumulation orders "are not insufficient." However, the State asserts, those orders "do create a non-terminating series of sentences" and "this Court should delete the cumulation order from the deadly-weapon case to correct this error."

In the written judgments described above in trial court cause numbers F-16-51966-P and F-14-15551-P, the trial court ordered each sentence to run consecutively with the other. Accordingly, we conclude the cumulation orders in both cases are insufficient. *See Madrigal Rodriguez*, 749 S.W.2d at 580. However, we disagree with appellant's position that the record does not contain the necessary data to reform and correct the trial court's cumulation orders. *See id*. In fact, the circumstances before us are virtually identical to those in *Madrigal Rodriguez. See id*. In that case, the defendant was convicted of aggravated assaults in two trial court cases and punishment was assessed by the trial court at a consolidated punishment hearing. *Id*. at 577. The

trial court assessed punishment at ten years for each offense and ordered the sentences to run consecutively. *Id*. On appeal, the defendant argued in part that the trial court's cumulation orders were void because in the two written judgments, the trial court ordered each sentence to run consecutively with the other. *Id*. at 580. The court of appeals disagreed with that position. *Id*. The court of appeals started in part that the record showed (1) "[a]t the same punishment hearing, the trial court assessed punishment for the conviction in 87-CR-247-C first and then for 87-CR-248-C"; (2) "the trial court stated that the sentences would run consecutively"; (3) "[s]ince it was the trial court's stated intent to run the sentences consecutively, we will reform each sentence"; and (4) "reformation is possible because the appellate court has the information suggested for cumulation as provided in *Ward v. State*, 523 S.W.2d 681." *Id*. Then, the court of appeals deleted the cumulation order in cause number 87-CR-247-C and reformed the judgment in cause number 87-CR-248-C to show that the sentence in that case shall begin when the ten-year sentence imposed for aggravated assault in cause number 87-CR-247-C has ceased to operate. *Id*.

In the case before us, the record shows (1) at the same punishment hearing, the trial court assessed punishment for the conviction in trial court cause number F-16-51966-P first and then for trial court cause number F-14-15551-P, and (2) the trial court stated that the sentences would run consecutively. *See id*. Further, the trial court's written judgments are clear as to the cause numbers respecting the two sentences to be cumulated. *See id*. Therefore, we conclude the record contains the necessary information for reformation in this case. *See id*.

We (1) modify the judgment in trial court cause number F-16-51966-P to delete the cumulation order in that judgment and (2) modify the judgment in trial court cause number F-14-15551-P to state that the sentence in that case shall begin only when the ten-year sentence imposed for aggravated assault with a deadly weapon in trial court cause number F-16-51966-P

pursuant to the trial court's November 14, 2016 judgment in that case has ceased to operate. *See id*. In light of those modifications, appellant's second issue is decided against him. *See id*.

IV. CONCLUSION

We decide appellant's two issues against him. We (1) modify the judgment in trial court cause number F-16-51966-P to delete the cumulation order in that judgment and (2) modify the judgment in trial court cause number F-14-15551-P to state that the sentence in that case shall begin only when the ten-year sentence imposed for aggravated assault with a deadly weapon in trial court cause number F-16-51966-P pursuant to the trial court's November 14, 2016 judgment in that case has ceased to operate. The trial court's judgments are otherwise affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
161370F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN MAREZ, Appellant

No. 05-16-01370-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1415551-P.
Opinion delivered by Justice Lang. Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to state that the sentence in trial court cause number F-1415551-P shall begin only when the ten-year sentence imposed for aggravated assault with a deadly weapon in trial court cause number F-1651966-P pursuant to the trial court's November 14, 2016 judgment in that case has ceased to operate.

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 14th day of November, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN MAREZ, Appellant

No. 05-16-01371-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1651966-P.
Opinion delivered by Justice Lang. Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to delete the cumulation order in the November 14, 2016 judgment in trial court cause number F-1651966-P.

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 14th day of November, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN MAREZ, Appellant

No. 05-16-01372-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1675271-P.
Opinion delivered by Justice Lang, Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 14th day of November, 2017.