Affirmed as modified; Opinion Filed May 17, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00288-CR
No. 05-17-00379-CR

JESSE PERKINS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 7
Dallas County, Texas
Trial Court Cause Nos. F16-00815-Y & F15-15017-Y

MEMORANDUM OPINION

Before Justices Francis, Evans, and Boatright
Opinion by Justice Evans

Jesse Perkins appeals his convictions for murder and aggravated assault. In the murder case, appellant contends that the trial court erred by denying his request for a jury instruction on a lesser-included offense. In both the murder and aggravated assault cases, appellant contends that the cumulation order is void. In a cross-issue, the State requests that we modify the judgment in the aggravated assault case to reflect appellant's plea of not true and that there was no plea bargain. As modified, we affirm the trial court's judgments.

BACKGROUND

In cause no. F15-15017-Y, appellant was indicted for aggravated assault with a deadly weapon. On December 4, 2015, appellant pled guilty to the aggravated assault offense and, pursuant to a plea-bargain agreement, was placed on four years' deferred adjudication community

supervision. In cause no. F16-00815-Y, appellant was indicted for the December 18, 2015 murder of Dessie Hancock. On November 9, 2016, the State filed an amended motion to adjudicate appellant's guilt alleging that he had violated the terms of his community supervision by murdering Dessie Hancock.

On February 7, 2017, a jury trial began on the murder case. Prior to the start of trial, the trial court informed appellant that it would be conducting the motion to adjudicate during the murder trial and accepted appellant's plea of not true. On February 9, 2017, after the jury returned its guilty verdict on the murder charge, the trial court dismissed the jury for the day and proceeded on the State's motion to adjudicate. The trial court granted the State's motion and adjudicated appellant's guilt.

The following day, a joint punishment hearing was held for both cases. The jury assessed punishment in the murder case at thirty-three years' imprisonment. The trial court assessed punishment in the aggravated assault case at twenty years' imprisonment.

The evidence presented during trial shows that on December 18, 2015, appellant assaulted eighty-three old Dessie Hancock by punching and kicking her in the face. At the time of the assault, Hancock was on a walker standing in her driveway. Hancock's injuries included a fractured skull and brain hemorrhages. Hancock never regained consciousness and died from her injuries the next day.

Appellant's brother, Thomas Perkins, witnessed the assault. He testified that on the day of the assault, he met up with appellant, and their brother, Edward, and they all drank alcohol in the culverts near their house. Thomas Jamarillo, a mutual acquaintance of the brothers, lived nearby. While the brothers were drinking, appellant and Edward talked about the theft of a video game player from their house. Jamarillo's name came up in connection with the theft because he had been to their house several times. Appellant "got mad" and started walking to Jamarillo's house

to confront him. Thomas and Edward tried unsuccessfully to stop appellant and followed him to Jamarillo's house. When they got to Jamarillo's house, they saw Hancock standing in a driveway on her walker. Appellant went up to Hancock, "got in her face" and started cursing and saying "mean things." Thomas pulled appellant away from Hancock, apologized, and told her appellant was drunk. Appellant then went to Jamarillo's house. Jamarillo's sister told appellant that he was in the shower; appellant told her to tell Jamarillo he was outside. The sister then slammed the door in appellant's face. When no one returned to the door, appellant said to Thomas, "Where is that old bitch at?" Appellant then walked back to Hancock and hit her in the face with his fist with such force that she fell to the ground. After she fell to the ground, appellant kicked her head with his foot. Thomas pushed appellant away from her and then had to push him two more times to keep him from returning to Hancock's body. The brothers then ran home. Thomas testified that Hancock did nothing to provoke the attack.

Within thirty minutes of the assault, the police received information which led them to investigate at the brothers' house. Appellant and his brothers voluntarily went to the police station with the detectives and were interviewed the next day. The interview was played for the jury. During the interview, appellant admitted that he was responsible for Hancock's injuries but claimed he did not remember anything about who he assaulted or why he assaulted the person because he was too drunk at the time. Appellant could only remember throwing a punch and then running away. Appellant told the detective that when he got drunk, he got violent.

Appellant also testified at trial that he did not remember anything about the assault other than the fact that he had thrown a punch. He testified that he did not know who it was or why he did it because he had blacked out. He remembered his brother pushing him and then trying to run away. He did not remember arriving home and vaguely remembered getting in the police car or

what happened when he got down to the police station. Appellant testified that when he was drunk, he sometimes got aggressive.

ANALYSIS

I. Lesser Included Instruction of Manslaughter

In appellant's first issue, he contends that the trial court erred in denying his request to include a jury instruction on the lesser-included offense of manslaughter. The State argues that based upon the alternative theories of murder alleged in the indictment and included in the jury charge, and the evidence presented at trial, appellant was not entitled to a charge on manslaughter. We agree with the State.

Appellant was charged with committing murder under two different legal theories – serious-bodily-injury murder and felony murder. Under the first theory, a defendant commits murder if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(2) (West 2011). Under the second theory, a defendant commits felony murder if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. *Id.* § 19.02(b)(2). In this case, the State charged appellant with the underlying felony offenses of aggravated assault and injury to an elderly individual. It further charged that under both theories of murder, the act clearly dangerous to human life causing Dessie Hancock's death was inflicting blunt force trauma to her head with a hand, a deadly weapon, or with a foot, a deadly weapon.

We apply the *Aguilar/Rousseau* test when assessing whether the trial court should have given a charge on a lesser-included offense. *See Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). The first step is to determine whether the offense is actually a lesser-included

offense of the offense charged. *Id.* The second step requires us to consider whether there was some evidence raised at trial from which a rational jury could find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.*

Manslaughter is a lesser-included offense of the serious-bodily-injury murder charge in this case. *Id.* at 384.[1] However, manslaughter is not a lesser-included offense of felony murder. Manslaughter requires proof of recklessness in causing the death of an individual. Felony murder is an unintentional murder committed in the course of committing a felony. *Driver v. State,* 358 S.W.3d 270, 278 (Tex. App.—Houston [1st. Dist.] 2011, pet. ref'd) (citing *Threadgill,* 146 S.W.3d 654, 665 (Tex. Crim. App. 2004)). The state must prove the elements of the underlying felony, including that culpable mental state, but no culpable mental state is required for the murder committed. *Id.* (citing *Lomax v. State,* 233 S.W.3d 302, 306–07 (Tex. Crim. App. 2007).

In *Arevalo v. State,* the Court of Criminal Appeals held that if sufficient evidence of more than one theory of the greater offense is presented to allow the jury to be charged on alternate theories, the second prong of the test is satisfied only if there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater. *Arevalo v. State*, 970 S.W.2d 547, 549 (Tex. Crim. App. 1998). Thus, only if every theory properly submitted is challenged would the jury be permitted to find the defendant guilty only of the lesser offense. *Id.*

In this case, the State presented evidence on both theories of murder, and the jury charge required the jury to find only one of the two theories to convict appellant of the offense. Appellant

[1] In *Cavazos,* the Court noted the only difference between murder as alleged in the indictment and the offense of manslaughter was that manslaughter included recklessness, and because the definition of recklessness is disregarding a risk that circumstances exist or the result will occur, the reckless mens rea for manslaughter applies to either the nature of the conduct or the result of the conduct. *Id.* Thus, the Court concluded that causing death while consciously disregarding a risk that death will occur differs from intending to cause serious bodily injury with a resulting death only in the respect that a less culpable mental state establishes its commission. As such, manslaughter was a lesser-included offense of murder. *Id. See* TEX. CODE CRIM. PROC. ANN. art. 37.09(3) (West 2006).

does not challenge the evidence to support the conviction for murder under the felony murder theory.

Even if appellant's argument can be construed to include a challenge to both theories of murder submitted to the jury, there is no evidence in the record that negates felony murder. The State charged appellant with the underlying felony offenses of aggravated assault by causing serious bodily injury and using or exhibiting a deadly weapon and injury to an elderly individual. Both bodily injury aggravated assault and injury to an elderly individual are "result of conduct" offenses which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the injury. *See Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008); *Kelly v. State*, 748 S.W.2d 236, 239 (Tex. Crim. App. 1988). In this case, the culpable mental state alleged for both the aggravated assault and injury to an elderly person was intentionally or knowingly. *See* TEX. PENAL CODE ANN. §§ 22.02(a)(1), 22.04(a)(1), (3) (West 2011). A person acts intentionally, or with intent, with respect to the result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. TEX. PENAL CODE ANN. § 6.03(a), (b) (West 2011). Appellant testified at trial that he did not recall the events because he blacked out from having drank so much alcohol; the only thing he could remember was throwing a punch but did not know who it was that he punched or why he did it.[2] Appellant also told the investigating detective that he did not remember

[2] Specifically, when questioned, appellant testified as follows:

Q. So you said you remember leaving going over to Thomas' friend's house, is that correct?

A. Yes.

Q. What happened next?

A. Um, it's I blacked out. I had been drinking a lot. . .

anything about whom he assaulted or why he assaulted the person because he was too drunk. Voluntary intoxication does not negate the culpable mental state of a crime. *See* TEX. PENAL CODE ANN. § 8.04(a) (West 2011); *Hawkins v. State,* 605 S.W.2d 586, 588 (Tex. Crim. App. 1980) (evidence of defendant's intoxication did not negate elements of intent or knowledge in prosecution for offense of aggravated assault).[3]

So I just remember coming to and having thrown a punch and then like a white blur going down.

And next you know my brother Thomas like pushed me. What are doing, what are you doing. We gotta go. I'm like what, what, why. I'm really confused. And I remember trying to run. I fell but after that I don't remember going to or from the neighborhood.

. . .

Q As you sit here today do you have a recollection of striking Dessie Hancock?

A Ah, I don't recall at the time it being her. Like I said I just remember my left hand going out and white blur going down. As to who it was or why I did it I don't know.

. . .

Q Okay. The whole point today is that you want to tell the jury I was so drunk I don't remember what happened, correct?

A Not just say I was so drunk but the fact I had blacked out and due to my consumption of alcohol.

Q You drank so much that you blacked out and you don't remember anything, right?

A Ah, yes.

Q So the truth it is at the time of this offense what you were thinking and what your state of mind is you can't tell the jury anything about that because you can't, you don't remember, right?

A Everything except what I said already.

Q You can't tell us what was going through your mind, you don't remember it, right?

A Just what I remember coming to, to remember, yes.

Q Told us all -- sir, sir, let me finish my question then you answer.
You're telling us all you remember is throwing a jab, right?

A Yes.

Q With regards to your state of mind you can't tell us what was going through your mind and what you were thinking cause you were blacked out according to you, right?

A Yes.

[3] Appellant's testimony regarding the fact that he "blacked out" and did not know who he hit or why he hit her also supports the trial court's refusal to instruct the jury on the lesser included offense of manslaughter. A person commits manslaughter if he recklessly causes the death of another. The definition of recklessness is consciously disregarding a substantial and unjustifiable risk that circumstances exist or the result will occur. By his own admission,

We conclude that the trial court did not err in refusing to instruct the jury on the lesser-included offense of manslaughter and overrule appellant's first issue.

II. Cumulation Order

In appellant's second issue, he contends that the trial court abused its discretion by cumulating his murder conviction onto his sentence for aggravated assault in violation of TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (West Supp. 2017). We disagree.

The record shows that the State filed a motion to cumulate sentences in both the murder case and the aggravated assault case. Prior to the start of the murder trial, the trial court informed appellant that it would be conducting the motion to adjudicate in the aggravated assault case during the murder trial and accepted appellant's plea of not true. Immediately after the jury returned its guilty verdict on the murder charge, the trial court dismissed the jury for the day and proceeded on the State's motion to adjudicate. The trial court granted the State's motion and adjudicated appellant's guilt. The following day, a joint punishment hearing was held for both cases. When the jury went out to deliberate on punishment in the murder case, the trial court returned to the adjudication proceeding in the aggravated assault case and, after both parties indicated they had no further evidence to present, the trial court assessed punishment and sentenced appellant to twenty years' imprisonment. Two hours later, the jury returned with a punishment verdict of thirty-three years' imprisonment in the murder case. The trial court pronounced judgment and sentenced appellant in accordance with that verdict. The trial court then granted the State's motion to cumulate the sentences and ordered that the sentence in the murder case run consecutive to the

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appellant was not aware of having caused the victim's death at the time of the assault. Therefore, there was no evidence that would permit a jury to rationally find that at the time he assaulted Hancock, the appellant was aware of, but consciously disregarded, a substantial and unjustifiable risk that the victim would die as a result of his conduct. *See Schroeder v. State*, 123 S.W.3d 398, 400–01 (Tex. Crim. App. 2003) ("We also recognize. . . that it is difficult to understand how a person may "consciously disregard" a risk of which he is unaware.").

sentence in the aggravated assault case. The cumulation order, as pronounced by the trial court, is set forth in both judgments.

Article 42.08(a) provides that when a defendant is convicted in two or more cases, the trial court may order the judgment and sentence imposed in the second conviction to begin to run when the judgment and sentence imposed in the previous conviction has ceased to operate or to run concurrently with the previous judgment and sentence. *Id.* The decision to impose concurrent or cumulative sentences is within the discretion of the trial court. *See Pettigrew v. State*, 48 S.W.3d 769, 770 (Tex. Crim. App. 2001). We review a trial court's decision to cumulate sentences for an abuse of discretion. *See Hurley v. State,* 130 S.W.3d 501, 503 (Tex. App.—Dallas 2004, no pet.). An abuse of discretion will be found only if the trial court imposes consecutive sentences where the law imposes 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. *Nicholas v. State*, 56 S.W.3d 760, 765 (Tex. App.—Houston [14th Dist.], pet. ref'd). An improper cumulation order is a void sentence and error may be raised at any time. *Hurley*, 130 S.W.3d at 503.

Appellant contends that the order of cumulative sentences is determined by convictions, not sentencing, and argues that the cumulation order in this case is void because the murder conviction occurred first since the jury returned its verdict of guilty before the trial court adjudicated his guilt in the aggravated assault case. Thus, according to appellant, the aggravated assault case was the second conviction for purposes of Article 42.08(a). Appellant cites *Pettigrew v. State*, 48 S.W.3d 769, 772 (Tex. Crim. App. 2001), *Townsend v. State*, 187 S.W.3d 131, 133 (Tex. App.—Texarkana 2006, pet. ref'd), and *Barela v. State,* 180 S.W.3d 145, 148 (Tex. Crim. App. 2005), to support his claim. The State argues that appellant's hyper-technical application of Article 42.08(a) is not supported by case law and relies on the holdings in *Townsend* and *Hughes*

v. State, 673 S.W.2d 654, 658 (Tex. App.—Austin 1984, pet. ref'd) for the proposition that in a consolidated proceeding with multiple convictions, case law provides for flexibility in stacking sentences.

In construing Article 42.08(a), the Texas Court of Criminal Appeals has held that the trial court should be given flexibility in cumulating sentences. *See Barela*, 180 S.W.3d at 148; *Pettigrew*, 48 S.W.3d at 773. In *Barela*, the court held the order of conviction controlled where convictions were had in Arizona, no sentences pronounced, but later convictions occurred in Texas. *Barela*, 180 S.W.3d at 149. In *Pettigrew*, the order of sentencing was the focal point where community supervision was granted but later revoked after the appellant was convicted for another offense. *Pettigrew*, 48 S.W.3d 771. Here, we rely on these cases for the proposition stated above that is common to both: in cumulating sentences under article 42.08(a), the trial court has flexibility.

Likewise, almost identical to the fact scenario presented here, the trial court in *Townsend* first found the appellant guilty of driving while intoxicated and, at the same hearing, found him guilty on two drug offenses. *Townsend*, 187 S.W.3d at 132. At a later sentencing hearing, the court first sentenced him to prison in the drug cases and then sentenced him to prison in the DWI case. *Id.* Although the appellant was convicted in the DWI first, the trial court stacked the DWI prison sentence on one of the drug sentences. *Id.* The identical statutory construction argument was made in that case that appellant makes today. *Id.* The appellate court held the trial court did not abuse its discretion in the cumulation order. The court noted the trial court's statement that the DWI occurred after the two drug offenses and held that under *Pettigrew* and *Barela*, the trial court had that flexibility. *Townsend*, 187 S.W.3d at 134. We agree.

Accordingly, we conclude that the trial court properly cumulated the sentence in the murder case onto the sentence in the aggravated assault case for purposes of Article 42.08(a). Appellant's second issue is overruled.

III. Modification of Judgment

In a cross-issue on appeal, the State requests that we modify the judgment in the aggravated assault case to accurately reflect that appellant pled not true to the State's motion to adjudicate and that there was no plea bargain agreement. The trial court's judgment shows that appellant pled true to the State's motion to adjudicate and that the twenty year sentence was a plea bargain. However, the trial record shows that appellant entered a plea of not true to the motion to adjudicate. The trial record also shows that the punishment assessed was not the result of a plea bargain. Accordingly, we modify the judgment to reflect that appellant pled not true to the motion to adjudicate and that there was no plea bargain. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd.).

CONCLUSION

As modified, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JESSE PERKINS, Appellant	On Appeal from the Criminal District Court No. 7, Dallas County, Texas
No. 05-17-00288-CR V.	Trial Court Cause No. F16-00815-Y.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans, Justices Francis and Boatright participating.

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

Judgment entered this 17th day of May, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JESSE PERKINS, Appellant	On Appeal from the Criminal District Court No. 7, Dallas County, Texas
No. 05-17-00379-CR V.	Trial Court Cause No. F15-15017-Y.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans, Justices Francis and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The Section entitled "Plea to Motion to Adjudicate" is modified to state "Not True."

The Section entitled "Terms of Plea Bargain" is modified to state "N/A."

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

Judgment entered this 17th day of May, 2018.