

Affirmed in part; Affirmed as Modified and Opinion Filed June 13, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00545-CR

No. 05-17-00588-CR

DEREK LEE OESTREICH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause Nos. F16-33451-K & F16-35090-K**

MEMORANDUM OPINION

**Before Justices Francis, Fillmore, and Whitehill
Opinion by Justice Francis**

Derek Lee Oestreich entered a plea of guilty to aggravated robbery and true to one of two enhancement paragraphs alleged in the indictment. He also entered a plea of guilty to state jail theft from a person and true to both enhancement paragraphs. After hearing testimony, the trial court found appellant guilty of aggravated robbery, found one enhancement true, made a deadly weapon finding, and set punishment at twenty years in prison. The court also found appellant guilty of theft from a person, found both enhancements true, and set punishment at ten years in prison.

In each case, appellant filed a motion for new trial that the trial court appeared to grant. No action was taken in the trial court on the purported grants of a new trial, and the State did not respond. After appellant focused his briefing on appeal to the new trial issue, the State requested

we abate and allow the trial court to determine if it actually intended to grant each motion. We abated the appeals. The trial court held a hearing, withdrew each order granting a new trial, and denied each motion. After receiving the supplemental record, this Court reinstated the appeals and allowed rebriefing. In an amended brief, appellant presents two issues regarding the assessment of costs in each case. We affirm.

The complaining witness in the aggravated robbery case, Oscar Flores-Soto, wanted to sell a truck so he posted a “truck for sale” sign in his front yard. Appellant knocked on his door at 9:15 one night and asked to see the truck. Initially reluctant to get out of bed and go outside, Flores-Soto ultimately showed the truck to appellant, started the engine, and let appellant use his phone to call someone about bringing him money to pay the sales price. After waiting thirty minutes for the money to arrive, appellant called another person about money. When he handed the phone back to Flores-Soto, appellant pulled a gun, pointed it at his head, and “said he wants the truck, and the money, my wallet. He asked me for the other truck that I have in the back of the yard. He tied me up to the tree in front of my family.” When Flores-Soto saw appellant point the gun at his teenage son, he broke away from the tree. His wife and both children were watching as appellant again pointed the gun at Flores-Soto before driving away in the truck. The police found the abandoned truck about fifteen minutes later and appellant was arrested and indicted.

Nine months later, the second case occurred while appellant was on bond for the aggravated robbery. Appellant went in a store and tried to steal clothes to sell so he could buy drugs. He threw the manager of the store against the door and was arrested in the parking lot.

At trial, appellant told the court he had abused drugs and alcohol starting at age twelve. He said he was “dope sick” at the time he robbed Flores-Soto at gunpoint and admitted using methamphetamine and Xanax around that time. Appellant testified to having a number of prior offenses for burglary, robbery, failure to stop and render aid, credit card abuse, and tampering with

physical evidence. He served two stints in prison for three- and six-year terms. Appellant told the court he was participating in multiple rehabilitative programs in the Dallas County jail and wanted to turn his life around with drug treatment.

In his first issue, appellant contends the trial court violated article 102.073 of the Texas Code of Criminal Procedure by assessing duplicative court costs in the theft from a person case. Article 102.073 states that “[i]n a single criminal action in which a defendant is convicted of two or more offenses . . . , the court may assess each court cost or fee only once against the defendant.” TEX. CODE CRIM. PROC. ANN. art. 102.073(a) (West Supp. 2017). The article further states that “each court cost or fee the amount of which is determined according to the category of offense must be assessed using the highest category of offense that is possible based on the defendant’s convictions.” *Id.* Art. 102.073(b). Here, the trial court assessed court costs of \$249 in both judgments even though the offenses were prosecuted in the same criminal action. Appellant should have been assessed costs only in the aggravated robbery case which, as a first-degree felony, was the higher category offense. *Id.* We sustain the first issue. We modify the judgment for appellant’s theft from a person conviction to delete the award of costs. *See Robinson v. State*, 514 S.W.3d 816, 828 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d); *Phillips v. State*, No. 05-16-01409-CR, 2018 WL 271801, at *1 (Tex. App.—Dallas Jan. 3, 2018, pet. ref’d) (mem. op.) (not designated for publication).

In his second issue, appellant argues the total amount of court costs reflected as due in the judgment in the aggravated robbery offense in No. 05-17-00545-CR (Trial Court No. F16-33451-K) is not the same as the total amount contained in the itemized list of assessed costs issued by the district clerk.

The judgment reflects an amount due of \$249, which includes a \$25 installment plan fee contained in the supplemental reporter’s record and assessed under section 133.103(a) of the Local

Government Code. *See* TEX. LOC. GOV'T CODE ANN. §133.103(a). The court costs reflected in the judgment are correct. We overrule the second issue.

We affirm the trial court judgment in 05-17-00545-CR. We affirm as modified the judgment in 05-17-00588-CR.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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TEX. R. APP. P. 47.2(b)
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

DEREK LEE OESTREICH, Appellant

No. 05-17-00588-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
No. 4, Dallas County, Texas
Trial Court Cause No. F16-35090-K.
Opinion delivered by Justice Francis;
Justices Fillmore and Whitehill
participating.

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

To delete the award of court costs in the amount of \$249.00.

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

Judgment entered June 13, 2018.



**Court of Appeals
Fifth District of Texas at Dallas**

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

Judgment entered June 13, 2018.