

AFFIRM AS MODIFIED; Opinion Filed May 27, 2020



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

**No. 05-19-00764-CR
No. 05-19-00765-CR**

**TIMOTHY DONHAM, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F19-40292-R, F19-00142-R**

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

Timothy Donham appeals his convictions for arson and stalking. In his first issue, appellant seeks to modify the judgment in the stalking case to reflect the correct offense statute. In his second issue, appellant argues the court costs in the judgment in the stalking case are duplicative of the costs assessed in the arson case. In his third and fourth issues, appellant urges a portion of the time payment fee in both cases is facially unconstitutional. We affirm the judgments as modified below. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

In October 2018, appellant met a woman, the complainant, on a dating website, and he soon thereafter moved in with her. By January 2019, the complainant decided to end the relationship and evict appellant. Appellant was upset by this turn of events and spent several days sending threatening messages to the complainant. The day after the complainant ended the relationship, she discovered her car's windshield was cracked. She suspected appellant was the vandal. When she confronted appellant, he denied breaking her windshield and told her that, "if it were him, [her] car would be on fire." On the night of January 29, the complainant woke up to learn her car and her mother's car were on fire.

In March 2019, appellant was charged by separate indictments for arson and stalking. Appellant judicially confessed and entered open pleas of guilty to each charge. The trial court assessed punishment at six years' confinement in each case. Appellant timely appealed.

DISCUSSION

I. Offense Statute

In his first issue, appellant argues the judgment in trial cause number F19-00142-R, appellate case number 05-19-00765-CR, reflects an incorrect offense statute. The State agrees with appellant and concedes that the judgment should be reformed to reflect the correct offense statute. The judgment lists the statute for the talking offense as "42.072 b Penal Code." But that section simply provides the

offense degree for stalking. TEX. PENAL CODE ANN. § 42.072(b). Section 42.072(a) sets out the elements for the offense of stalking. *Id.* § 42.072(a).

We have the authority to modify the trial court’s judgment to make the record speak the truth. TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1991). Accordingly, we modify the trial court’s judgment in trial cause number F19-00142-R to reflect the offense statute as “42.072 a Penal Code.”

II. Duplicative Court Costs

In his second issue, appellant asks this Court to delete court costs from the judgment in his stalking case. In a single criminal action such as the one involved here, 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).

The two charges against appellant—stalking and arson—were tried in a single proceeding, and thus fall within a single criminal action. *See Burton v. State*, No. 05-18-00608-CR, 2019 WL 3543580, at *3 (Tex. App.—Dallas Aug. 5, 2019, no pet.) (mem. op., not designated for publication) (citing *Hurlburt v. State*, 506 S.W.3d 199, 201–04 (Tex. App.—Waco 2016, no pet.)). Therefore, court costs should only be assessed for one of the offenses and the imposition of costs in both cases is duplicative. CRIM. PROC. art. 102.073(a). The judgment in each case reflects an assessment of \$249 in court costs against appellant. Appellant should have been assessed the costs in the arson case only, because it is the higher category of offense.

See id. at 102.073(b); compare PENAL § 42.072(b) with *id.* § 28.02(d). We conclude that the duplicative court cost was imposed in violation of article 102.073, and accordingly affirm appellant's second issue.

This Court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information before us to do so. *See* TEX. R. APP. P. 43.2(b); *French*, 830 S.W.2d at 609. This includes modifying a judgment to eliminate duplicative court costs. *See Rubio v. State*, No. 05–17–00621–CR, 2018 WL 3424362, at *3 (Tex. App.—Dallas July 16, 2018, pet. ref'd) (mem. op, not designated for publication). Accordingly, we sustain appellant's second issue and modify the judgment in the stalking case to delete the \$249 in duplicative court costs.

III. Unconstitutional Portion of Time Payment Fee

In his fourth issue, appellant contends a portion of a \$25 time payment fee assessed as part of the court costs in the arson case under section 133.103 of the Local Government Code is facially unconstitutional.¹ Specifically, he argues that the fees collected under subsections (b) and (d) were not collected for a legitimate criminal purpose and therefore violate the separation of powers provision of the Texas Constitution. He asks that we modify the judgment to delete \$22.50 of the court costs assessed in the arson case.

¹ In his third issue, appellant similarly challenges a portion of the time payment fee assessed as court costs in the stalking case. As we have already concluded the court costs assessed in the stalking case should be deleted as duplicative, we need not address this third issue. *See* TEX. R. APP. P. 47.4.

The State first responds that appellant has waived this complaint by failing to object below. We disagree. Although appellant did not object to the costs in the trial court, the costs were not imposed in open court and the written judgment does not contain an itemization of the imposed costs. Thus, appellant may challenge the constitutionality of the costs for the first time on appeal. *See Johnson v. State*, 537 S.W.3d 929, 929 (Tex. Crim. App. 2017) (per curiam).

As to the merits of his complaint, this Court recently addressed this exact issue and concluded subsections (b) and (d) of section 133.103 are facially unconstitutional. *See Ovalle v. State*, 592 S.W.3d 615, 618 (Tex. App.—Dallas 2020, pet. filed). We therefore sustain appellant’s fourth issue, and we modify the trial court’s judgment in trial cause number F19-40292-R to reduce the total amount of court costs by \$22.50 to reflect the reduction in the time payment fee from \$25 to \$2.50.

CONCLUSION

We modify the trial court’s judgment in trial cause number F19-00142-R to reflect the offense statute as “42.072 a Penal Code” and to delete the \$249 in court costs. We modify the trial court’s judgment in trial cause number F19-40292-R to reduce the total amount of court costs by \$22.50 to reflect the reduction in the time

payment fee from \$25 to \$2.50. As modified, we affirm the trial court's judgments.

/David J. Schenck/

DAVID J. SCHENCK

JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

TIMOTHY DONHAM, Appellant

No. 05-19-00764-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F19-40292-R.
Opinion delivered by Justice
Schenck. Justices Molberg and
Nowell participating.

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

to reduce the total amount of court costs by \$22.50 to reflect the reduction in the time payment fee from \$25 to \$2.50.

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

Judgment entered this 27th day of May, 2020.



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

to reflect the offense statute as "42.072 a Penal Code" and to delete
the \$249 in court costs.

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

Judgment entered this 27th day of May, 2020.