Opinion issued November 17, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00442-CR

KEITH SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1529312

MEMORANDUM OPINION

A jury found Keith Smith guilty of the offense of sexual assault of a child. *See* TEX. PENAL CODE § 22.011(a)(2). The jury then assessed Smith's punishment, enhanced by two prior felony convictions, at thirty years in prison. In four issues on appeal, (1) Smith raises an "as applied" challenge to the constitutionality of

Government Code section 74.056(a), the statute by which the judge who presided over his trial was appointed to sit by assignment; (2) he complains that the judge was not authorized to preside over his case because the order of assignment assigned the judge to the 263rd District Court, not to the 339th District Court, the court in which his case was prosecuted; (3) Smith asserts that, because the State had abandoned the second enhancement paragraph, the trial court erred by directing the jury to find both enhancement allegations in the indictment "true"; and (4) he claims that he is not required to pay the $754 in court costs ordered by the trial court because the trial court did not consider his ability to pay the costs as statutorily required.

We affirm.

Background

The indictment in this case was filed in the 339th District Court of Harris County. The indictment alleged that on July 7, 2014, Smith committed the offense of aggravated assault by placing his sexual organ in the sexual organ of the complainant, a person younger than 17 years of age. *See id.* The indictment also contained two enhancement paragraphs, which alleged that Smith had been convicted of the felony offense of possession of a controlled substance in 1999 and had been convicted of the felony offense of assault of a family member in 2006.

The case was tried to a jury from June 3 to June 5, 2019. The elected judge of the 339th District Court of Harris County, the Honorable Maria Jackson, did not try

the case, instead the Honorable Denise Bradley, a retired Harris County District Court judge, presided over the trial. Before voir dire began, Judge Bradley told the jury panel as follows:

> My name is Denise Bradley. I am a senior retired judge. . . . I have retired and they've asked me to come back to try cases because as you can imagine, since the hurricane things were very slow down here. We've got a backlog. So, of course, I'm thrilled to be able to come back into this building and to have the opportunity to preside over criminal cases here in Harris County.

The jury later found Smith guilty of the offense of sexual assault of a child. At the beginning of the punishment phase, Smith pleaded true to both felony enhancements in the indictment. As instructed in the charge, the jury found the enhancement allegations in the indictment to be true. The jury assessed Smith's punishment at thirty years in prison.

Assigned Judge's Authority to Preside over Smith's Case

In his second issue,[1] Smith contends that Judge Bradley was not authorized to preside over the trial in his case. To support his contention, Smith has attached to his brief an order signed by the Presiding Judge of the Eleventh Administrative Judicial Region, dated May 8, 2019, assigning Judge Bradley to the 263rd District Court of Harris County. The order provides, in relevant part, as follows:

> Pursuant to Section 74.056, Texas Government Code, I hereby assign the Honorable Denise Bradley, Senior District Judge, 262nd Judicial

[1] We begin with Smith's second issue because it aids in the discussion of the first issue.

> District Court, to the 263rd Judicial District Court of Harris County, Texas.
>
> This assignment begins the 9th day of May, 2019 and is for the primary purpose of hearing cases and disposing of any accumulated business requested by the court.
>
> This assignment shall continue as may be necessary for the assigned Judge to dispose of any accumulated business and to complete trial of any case or cases begun during this assignment, and to pass on motions for new trial and all other matters growing out of accumulated business or cases heard before the Judge herein assigned, or until terminated by the Presiding Judge.

The order is not contained in the record, but Smith requests that we take judicial notice of the order. An appellate court may, within its discretion, take judicial notice of adjudicative and legislative facts on appeal. *Emerson v. State*, 880 S.W.2d 759, 765 (Tex. Crim. App. 1994); *see* TEX. R. EVID. 201(c)(2) (providing that court must take judicial notice "if requested by a party and supplied with the necessary information"). Generally, "appellate courts take judicial notice of facts outside the record only to determine jurisdiction over an appeal or to resolve matters ancillary to decisions that are mandated by law." *Gaston v. State*, 63 S.W.3d 893, 900 (Tex. App.—Dallas 2001, no pet.); *see Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (taking judicial notice of Texas Department of Criminal Justice regulation).

Even if we take judicial notice of the presiding judge's May 8 order of assignment, we cannot sustain Smith's claim that Judge Bradley was not authorized

to preside over his trial. The order of assignment reflects that the presiding judge assigned Judge Bradley to the 263rd District Court pursuant to Government Code section 74.056. Section 74.056(a) provides that the presiding judge of an administrative judicial region may assign judges in the region to "try cases and dispose of accumulated business." TEX. GOV'T CODE § 74.056(a). Consistent with that provision, the presiding judge's order states that Judge Bradley's assignment was "for the primary purpose of hearing cases and disposing of any accumulated business requested by the court." *See id.*

Government Code section 74.054 provides that active, retired, or senior judges may sit by assignment. *See id.* § 74.054. Smith does not dispute that as a retired district court judge who has taken senior status, Judge Bradley is qualified to sit by assignment and does not otherwise dispute her qualifications. Instead, Smith argues that Judge Bradley was not authorized to preside over the proceedings in his case because the presiding judge's order assigned Judge Bradley to the 263rd District Court, not to the 339th District Court in which his case was tried. However, Smith did not object in the trial court to Judge Bradley's presiding over the proceedings. Without an objection and concomitant discussion in the record about Judge Bradley's assignment, we do not know whether the May 8 order of assignment provided by Smith with his brief was the only order of assignment under which Judge Bradley was sitting when she presided over the proceedings in Smith's case.

This Court has recognized that "it has long been a 'cardinal rule' of appellate procedure in Texas that we 'must indulge *every* presumption in favor of the regularity of the proceedings and documents' in the trial court." *Murphy v. State*, 95 S.W.3d 317, 320 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (emphasis in original) (quoting *McCloud v. State*, 527 S.W.2d 885, 887 (Tex. Crim. App. 1975)). "The presumption of regularity is a judicial construct that requires [an appellate] court, 'absent *evidence* of impropriety,' to indulge every presumption in favor of the regularity of the trial court's judgment." *Id.* (emphasis in original) (quoting *Light v. State*, 15 S.W.3d 104, 107 (Tex. Crim. App. 2000)). "We have consistently upheld the 'presumption of regularity of the judgment and the proceedings absent a showing to the contrary.'" *Id.* (quoting *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd)). The burden is on the appellant to overcome the presumption of regularity. *Id.*

Here, Smith asserts that Judge Bradley did not have authority to preside over his case because there was no order assigning her to the 339th District Court. As evidence of this, he attaches the May 8 order of assignment assigning Judge Bradley to the 263rd District Court. However, proof that Judge Bradley was assigned to the 263rd District Court is not evidence that there was no order assigning her to the 339th District Court. *See id.* Because he has not proffered affirmative support from the record demonstrating that no order assigned her to the 339th District Court, we

hold that Smith has failed to overcome the presumption of regularity. *Id.* (holding that mere absence of proof in record that visiting judge took oath of office does not overcome presumption of regularity)

Moreover, assuming the May 8 order is the only order of assignment, Judge Bradley was nonetheless authorized to preside over the trial in Smith's case. Government Code section 74.059(a) provides that a judge sitting by order of assignment has "all the powers of the judge of the court to which he is assigned." TEX. GOV'T CODE § 74.059(a); *see also* TEX. GOV'T CODE 24.003(b)(3) (providing that "a district judge in the county may . . . sit for another district court in the county and hear and determine any case or proceeding pending in that court"). Courts have held that a retired district court judge assigned to sit in one district court has the authority to preside in another district court. *See Mendoza v. Fleming*, 41 S.W.3d 781, 785 (Tex. App.—Corpus Christi 2001, no pet.) ("Courts have interpreted these provisions as allowing a judge properly assigned to one district court to preside in other district courts of the same county."); *Ex parte Dharmagunaratne*, 950 S.W.2d 140, 142 (Tex. App.—Fort Worth 1997, pet. ref'd) ("Under well-settled case authority, the proper assignment of Judge Walker to the 371st District Court authorized him to sit in the other district courts of Tarrant County, including the 297th District Court. Judges sitting by assignment may be properly authorized to preside over more than one court in a county."); *Tyrone v. State*, 854 S.W.2d 153,

156 (Tex. App.—Fort Worth 1993, pet. ref'd) (holding that retired judge assigned by presiding judge of Eighth Administrative Judicial District to sit in Criminal District Court Number 3 had authority to preside over appellant's trial in Criminal District Court Number 2); *Tart v. State*, 642 S.W.2d 244, 246 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (holding that retired judge assigned by presiding judge of Second Administrative Judicial District to sit in 232nd District Court had authority to preside over appellant's trial in 208th District Court). Thus, if she was, in fact, assigned only to sit in the 263rd District Court, retired senior Judge Bradley was authorized to preside over Smith's trial in the 339th District Court. And Smith's failure to object in the trial court forfeits any complaint he now has on appeal regarding Judge Bradley's lack of authority under the order of assignment. *See Wilson v. State*, 977 S.W.2d 379, 380 (Tex. Crim. App. 1998) (holding that appellant may not object for first time on appeal to procedural irregularity in assignment of otherwise qualified judge).

We overrule Smith's second of issue.

As-Applied Challenge to Government Code Section 74.056(a)

In his first issue, Smith contends that Government Code section 74.056(a) is unconstitutional under Article V, section 7 of the Texas Constitution as applied to the particular circumstances of his case.

A. Standard of Review

The constitutionality of a statute is a question of law that we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). A litigant who raises an "as applied" challenge to the constitutionality of a statute, as Smith does here, concedes the statute's general constitutionality and instead "asserts that the statute is unconstitutional as applied to his particular facts and circumstances." *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). In our analysis, we presume that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *See Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Thus, the burden rests on the individual challenging the statute to demonstrate its unconstitutionality. *Id.*; *see Schlittler v. State*, 488 S.W.3d 306, 313 (Tex. Crim. App. 2016).

B. Analysis

The May 8 order of assignment offered by Smith with his brief reflects that Judge Bradley was assigned to the 263rd District Court by the presiding judge of the administrative region, pursuant to Government Code section 74.056(a). Government Code section 74.056(a) provides:

> A presiding judge from time to time shall assign the judges of the administrative region to hold special or regular terms of court in any county of the administrative region to try cases and dispose of accumulated business.

TEX. GOV'T CODE § 74.056(a). Consistent with section 74.056(a), the May 8 order states that Judge Bradley was assigned to the 263rd District Court "for the primary purpose of hearing cases and disposing of any accumulated business requested by the court." Judge Bradley also stated on the record before voir dire began that she was a retired senior judge who had been asked to return to try cases because there was a case backlog since the hurricane, indicating that she had received her assignment to dispose of accumulated business under section 74.056(a).

Smith asserts that, as applied in this case, section 74.056(a) violates Article V, section 7 of the Texas Constitution, which sets out requirements regarding judicial districts and district court judges:

> The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution. Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

> The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

TEX. CONST. art. V, § 7.

Smith interprets Article V, section 7 to mean that only "the elected district judge" may "act on behalf of the district court" with the sole exception being found in the last sentence, which states that "the Legislature can provide for the holding of district court when the elected judge is absent, disabled, or disqualified from presiding." In his brief, Smith contends:

> Article V, Section 7 of the Texas Constitution is the constitutional provision that authorizes the Legislature to provide for the holding of district court by one other than the elected district judge. But the provision authorizes the Legislature to provide for the holding of district court only when the elected judge is absent, disabled, or disqualified.

Smith asserts that Government Code section 74.056(a) contravenes Article V, section 7 because the statute permits the assignment of judges "to try cases and dispose of accumulated business" in district courts without limiting the assignment to circumstances in which the elected district court judge is absent, disabled, or disqualified. Smith posits that section 74.056(a) "would be constitutional if it limited the circumstances in which someone besides the elected judge could exercise the district court's judicial power but the statute does not contain such limitation." Smith asserts that section 74.056(a) violates Article V, section 7 under the particular circumstances of this case because the statute permitted Judge Bradley to preside

over his case in the 339th District Court without any evidence that Judge Jackson—the elected judge of the 339th District Court—was unable to preside over his case due to her absence, disability, or disqualification.[2]

We find Smith's argument that section 74.056(a) violated Article V, section 7 under the circumstances of this case to be without merit. Smith's argument assumes that Article V, section 7 requires any statute enacted by the Texas Legislature, authorizing the assignment of judges to district courts, to include a requirement that the elected district court judge be absent, disabled, or disqualified in order for the assignment to be made. An analysis of Article V, section 7 shows that the provision does not contain that requirement.

"When interpreting our state constitution, we rely heavily on its literal texts, and are to give effect to its plain language." *Fain v. State*, 986 S.W.2d 666, 672 (Tex. App.—Austin 1998, pet. ref'd) (citing *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997)). "As with statutory construction, when we construe a provision of the Texas Constitution, we are principally guided by the language of the provision itself as the best indicator of the intent of the framers who drafted it and the citizenry who adopted it." *Johnson v. Tenth Jud. Dist. Ct. App. at Waco*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008); *see Oakley v. State*, 830 S.W.2d 107, 109 (Tex. Crim. App.

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[2] Smith asserts that the statute is not facially unconstitutional because "a visiting judge assigned [pursuant to section 74.056(a)] to try cases could handle a case in which the elected district judge was absent, disabled, or disqualified."

1992) ("[T]hose who are called on to construe the Constitution should not thwart the will of the people by construing it differently from its plain meaning").

Article V, section 7 states, in pertinent part: "The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding." TEX. CONST. art. V, § 7. The plain and literal meaning of the text directs the legislature to enact legislation that provides a means for court to be held when the elected district court judge is absent, disabled, or disqualified. *See id.* Consistent with the constitutional provision, the legislature has, for example, enacted Code of Criminal Procedure article 30.02, which provides that a district judge disqualified from hearing a criminal case must certify that fact to the presiding judge of the administrative judicial district who is then required to assign another judge to try the case. TEX. CODE CRIM. PROC. art. 30.02. The legislature has also enacted Government Code section 24.003(c), which provides that "[i]f a district judge in the county is sick or otherwise absent, another district judge in the county may hold court for the judge." TEX. GOV'T CODE § 24.003(c).

The interpretive commentary to Article 5, section 7 explains the purpose of the constitutional provision:

> So that absence, disability or disqualification of the judge during the session of the court will not operate to adjourn the court or prevent the holding of the court, the constitution authorizes the legislature to

> provide for the holding of district court when the judge is absent, or is for any cause disabled or disqualified from presiding.

TEX. CONST. art. V, § 7 (interpretative commentary). Both the plain language of the constitutional provision's text and its apparent purpose indicate that the provision was intended to ensure that when a district judge is absent, disabled, or disqualified, court can be held without significant delay or interruption. Nothing in the provision's text, or otherwise, indicates that the legislature lacks authority to enact legislation permitting eligible and qualified judges to be assigned to district courts even when the elected judge of the district court is not absent, disabled, or disqualified. *See Dean v. Dean*, 214 S.W. 505, 507 (Tex. Civ. App.—1919, no writ) (rejecting appellant's argument that portion of now-repealed statute allowing for election of "special judge" to sit for "regular" district court judge when regular judge is "unwilling to hold court," violated Article V, section 7 because being "unwilling to hold court" is not among the specified circumstances listed in section 7 and stating, "We do not think that, because the Constitution makes it the duty of the Legislature to provide for supplying the place of the regular judge in certain specified events, it is therefore deprived of the power to so provide in other events"); *see also Pierson v. State*, 177 S.W.2d 975, 977 (Tex. Crim. App. 1944) ("The Legislature has the power to pass any and all such laws as to it may seem proper, save and except where limited or prohibited from so doing by the Constitution of this State or by the Constitution of the United States."). Thus, we hold that Smith has not met his burden

to show that Government Code section 74.056(a) is unconstitutional as applied in this case.

We overrule Smith's first issue.

C. Abandonment of Enhancement Paragraph

In his third issue, Smith contends that the trial court committed charge error during the punishment phase of trial by instructing the jury to find the enhancement paragraphs in the indictment to be "true" and by instructing the jury that it must assess Smith's punishment at confinement in prison "for not less than twenty-five years nor more than ninety-nine years or life."

1. Relevant Background

Smith's indictment alleged that he committed the offense of sexual assault of a child, a second-degree felony. *See* TEX. PENAL Code § 22.011(a)(2), (f). The punishment range for a second-degree felony is 2 to 20 years in prison. *See id.* § 12.33. But, if a defendant charged with a second-degree felony has been previously convicted of a felony, then he or she "shall be punished for a felony of the first degree." *Id.* § 12.42(b). The punishment for a first-degree felony is imprisonment "for life or for any term of not more than 99 years or less than 5 years." *Id.* § 12.32(a). If the defendant has previously been finally convicted of two felony offenses, "and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final," then the defendant on conviction

shall be punished by imprisonment "for life, or for any term of not more than 99 years or less than 25 years." *Id.* § 12.42(d).

Here, the indictment alleged that Smith had previously been convicted of two prior felony offenses. Specifically, it alleged that Smith had been convicted of the felony offense of possession of cocaine in 1999 and, after that conviction, he had been convicted of the felony offense of assault of a family member in 2006.

At the beginning of the punishment phase, Smith pleaded true to the enhancement paragraphs. In the jury charge, the trial court informed the jury that Smith had pleaded true to both enhancement paragraphs. The trial court instructed the jury to find "true" the allegations in the two enhancement paragraphs and further instructed the jury that it must assess Smith's punishment at confinement in prison "for not less than twenty-five years nor more than ninety-nine years or life." *See id.* The jury followed the trial court's instructions and found the enhancement allegations in the two paragraphs to be true. The jury then assessed Smith's punishment at thirty years in prison. Smith made no objection to the jury charge in the trial court.

On appeal, Smith contends that the trial court erred by giving the jury these instructions regarding the enhancement paragraphs and the punishment range because, he claims, the State had abandoned, before trial, the second enhancement paragraph regarding his 2006 conviction for the offense assault of a family member.

Thus, he asserts, the jury should not have been instructed regarding the second enhancement paragraph and should have been instructed that the punishment range was imprisonment for five to ninety-nine years or life, rather than twenty-five to ninety-nine years or life.

2. Analysis

Our first duty in analyzing a jury-charge issue is to decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). To support his assertion that the trial court erred by instructing the jury to find the allegations in the second enhancement paragraph to be true, Smith points to a one-page document in the clerk's record file-stamped March 12, 2019, three months before trial. Below is an image of the document's contents:

Defendants Name: KEITH Smith

Cause# 1527929 1529312 Court 339

Sentence 10 years TDC Fine _____

Restitution _____

Payable to: Name _____

Address _____

No Contact with _____

Affirmative findings: _____Deadly Weapon

_____Family Violence

Other: State moves to abandon E FP #2

ADA Name J ALLARD

The document does not have a title, but the index to the clerk's record identifies the document as "Plea Terms." It is not apparent who filed the document or wrote the information contained in it.

In its brief, the State points out that the document in the clerk's record before the cited document is a "case reset form," filed January 14, 2019, two months before the cited document. The case reset form was signed by the attorneys for both sides, indicating that they agreed to reset trial for March 11, 2019. The case reset form also shows that, at that time, the State made a plea-agreement offer to Smith of thirty years in prison, and that Smith made a counteroffer of two years.

The State asserts that the cited document indicates that, two months after it offered thirty years to Smith as reflected in the case reset form, the State offered to abandon the second enhancement allegation—thus reducing the sentencing range—and offered a sentence of ten years in prison. The State asserts that, because Smith never accepted the offer, it never sought to abandon the second enhancement paragraph. While the State's explanation is plausible, nothing in the record provides a clear indication or explanation of the meaning or the purpose of the document cited by Smith.

The State also points out that the record contains no motion to abandon the second enhancement allegation or to amend the indictment. The State further points out that there is no indication that the indictment was amended to remove the

enhancement allegation. *See* TEX. CODE CRIM. PROC. arts. 28.10[3] (specifying procedures for seeking leave to amend indictment), 28.11 (providing that all amendments of charging instrument "shall be made with the leave of the court and under its direction"); *Puente v. State*, 320 S.W.3d 352, 358 (Tex. Crim. App. 2010) (recognizing that neither motion to amend indictment alone nor trial court's granting of that motion is amendment of indictment; rather, both together comprise authorization for amendment of charging instrument pursuant to Code of Criminal Procedure article 28.10). The record shows that, at the beginning of the punishment phase, Smith was arraigned on both enhancement paragraphs and pleaded true to the paragraphs, thus indicating that the trial court and the parties believed that the second enhancement paragraph was still being alleged.

We are mindful that "[i]t is generally presumed on appeal that the court ruled correctly and that the appellant must show error." *Hall v. State*, 829 S.W.2d 407, 410 (Tex. App.—Waco 1992, no pet.) (citing *Hardin v. State*, 471 S.W.2d 60, 63 (Tex. Crim. App. 1971)). An appellant has the burden "to present a record of the

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[3] This Court has applied article 28.10 to the amendment of enhancement paragraphs in an indictment while other courts have held that article 28.10 does not apply to enhancement paragraphs. *See James v. State*, 425 S.W.3d 492, 499–500 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (explaining that this Court was required to follow its precedent in *Boutte v. State*, 824 S.W.2d 322, 323 (Tex. App.—Houston [1st Dist.] 1992, pet ref'd), applying article 28.10(b) to amendment of enhancement paragraph in indictment and recognizing that other courts of appeal have held that article 28.10 does not apply to amendment of enhancement paragraphs).

alleged error sufficient for us to review it and determine if it was error and if so whether the defendant was harmed." *Montoya v. State*, 43 S.W.3d 568, 572 (Tex. App.—Waco 2001, no pet.). That is, an appellant "has the burden to present a record on appeal that shows he is entitled to relief." *McCarty v. State*, 227 S.W.3d 415, 418 (Tex. App.—Texarkana 2007); *see Simmons v. State*, 288 S.W.3d 72, 79–80 (Tex. App.—Houston [1st Dist.] pet. ref'd) (holding that appellant did not present sufficient record to show that trial court erred by permitting enhancement paragraph to be amended after start of trial because record did not indicate when indictment was amended).

We agree with the State that the document cited by Smith does not establish that the State "abandoned" the second enhancement paragraph. Smith has not presented a record showing that the trial court erred either when it instructed the jury to find both the enhancement allegations true or when it instructed the jury regarding the range of punishment.

We overrule Smith's third issue.

D. Assessment of Costs

In his fourth issue, Smith contends that the trial court erred by assessing $754 in court costs against him without inquiring about his ability to pay the costs. Code of Criminal Procedure article 42.15(a-1) requires that "during or immediately after imposing a sentence in a case" the trial court "shall inquire whether the defendant

has sufficient resources or income to immediately pay all or part of the fine and costs." TEX. CODE CRIM. PROC. art. 42.15(a-1).

On appeal, Smith asserts that "nothing in the record shows the trial judge considered Mr. Smith's ability to pay these assessed costs." We disagree. The recitals in the judgment of conviction reflect that the trial court ordered Smith to pay court costs "[a]fter having conducted an inquiry into [Smith's] ability to pay." The trial court signed the judgment the same day that it imposed Smith's sentence.

As mentioned above, in the absence of evidence to the contrary, we presume the regularity of the trial court's judgment and records. *Jones v. State*, 77 S.W.3d 819, 822 (Tex. Crim. App. 2002); *see Light*, 15 S.W.3d at 107. "Where procedural requirements do not affirmatively appear in the record to have been violated, a presumption of regularity of the trial judge's ruling must prevail." *Jones v. State*, 646 S.W.2d 449, 449 (Tex. Crim. App. 1983).

Recitals contained in a judgment create a presumption of regularity and truthfulness, absent an affirmative showing to the contrary. *Breazeale v. State*, 683 S.W.2d 446, 450–51 (Tex. Crim. App. 1985) (op. on reh'g). The burden is on the appellant to overcome this presumption. *Ex parte Wilson*, 716 S.W.2d 953, 956 (Tex. Crim. App. 1986).

Smith points out that the reporter's record from the sentencing hearing does not contain the inquiry regarding his ability to pay costs. However, silence in the

reporter's record regarding whether the trial court inquired about Smith's ability to pay the assessed costs does not contradict the recital in the judgment indicating that the trial court made the inquiry. *See Simms v. State*, 848 S.W.2d 754, 756 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (holding that recital in judgment that trial court found enhancement "true" not contradicted by trial court's failure to so state in reporter's record). We hold that Smith has not overcome the presumption of regularity. *See Breazeale*, 683 S.W.2d at 451 (instructing that presumption of judgment's regularity and truthfulness "is never to be lightly set aside").

We overrule Smith's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Hightower and Adams.

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