

Affirmed and Memorandum Opinion filed February 9, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00171-CR

TORI TERRELL RUFFINS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Cause No. 17511**

M E M O R A N D U M O P I N I O N

Appellant Tori Terrell Ruffins pled guilty to the offense of engaging in organized criminal activity. The trial court sentenced appellant to confinement for ten years in the Institutional Division of the Texas Department of Criminal Justice. Appellant filed a notice of appeal. We affirm.

In his sole issue, appellant claims the trial court erred in sentencing him in accordance with the punishment range of a third degree felony. Appellant argues that because the indictment to which he pled guilty alleged that he engaged in organized criminal activity by conspiring to commit burglary of a building, a state

jail felony, his sentence is illegal.

A sentence that exceeds the maximum statutory penalty is void. *Hern v. State*, 892 S.W.2d 894, 896 (Tex. Crim. App. 1994). A convicted defendant may raise for the first time on appeal, without having objected to the indictment, the argument that his punishment is outside the statutory range for the crime for which he is convicted. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).¹

As applicable to the case at bar, a person commits the offense of engaging in organized criminal activity “if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit” burglary. Tex. Penal Code § 71.02(a)(1). The statute provides that the punishment for conspiracy to commit burglary is the same as that for burglary. Tex. Pen. Code § 71.02(c). However, when a defendant commits the underlying crime, in this case burglary, in combination with two or more other persons, the defendant’s punishment is one category higher than the punishment for the underlying offense. *See* Tex. Penal Code § 71.02(b). Therefore if the State proves a defendant engaged in organized criminal activity by conspiring to commit burglary, the range of punishment is that for a state jail felony. Tex. Penal Code. §§ 30.02(c)(1) and 71.02(c). But if the State proves a defendant engaged in organized criminal activity by committing burglary, the range of punishment is that for a third degree felony, which is one category higher. Tex. Penal Code. § 12.04(a)(4), (a)(5) and 71.02(b).

In this case, the first paragraph of the indictment alleged that appellant committed burglary. The second paragraph alleged that appellant conspired to commit burglary. Appellant pled guilty to the entire indictment. He argues that

¹ Appellant does not argue the indictment was defective and no motion to quash the indictment was filed.

because there were two separate paragraphs and only the second contained the elements of engaging in organized criminal activity, he was charged with, and pled guilty to, engaging in organized criminal activity by *conspiring* to commit burglary, rather than *committing* burglary.

Appellant was not charged with two offenses nor was he convicted of burglary. Rather, he was charged with committing burglary, and having done so with the intent to establish, maintain, or participate in a combination or in the profits of a combination. *See State v. Duke*, 865 S.W.2d 466, 467–68 (Tex. Crim. App. 1993). An indictment may allege alternate methods of committing the offense when it may be committed in more than one way. *Carter v. State*, 196 S.W.3d 406, 408 (Tex. App.—Beaumont 2006, no pet.) (citing *Martinez v. State*, 498 S.W.2d 938, 943 (Tex. Crim. App. 1973)). An indictment may also allege, in the conjunctive, differing methods of committing the offense. *Id.* (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991)).

Because appellant pled guilty to both conspiring to commit burglary and to committing burglary, the applicable punishment range is that of a third degree felony and the trial court’s sentence of ten years was not illegal. *Id.* Appellant’s issue is overruled and the judgment of the trial court is affirmed.

/s/ Marc W. Brown
Justice

Panel consists of Justices Jamison, Donovan, and Brown.
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