



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00529-CR
No. 04-17-00530-CR

Zachary **SCHULTZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 16-1592-CR-C and Trial Court No. 16-1593-CR-C
Honorable William Old, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: May 23, 2018

AFFIRMED AS MODIFIED

Zachary Schultz pleaded guilty to kidnapping, injury to a child, and three counts of criminal mischief. The trial court assessed punishment at two years' state jail for each count of criminal mischief, ten years' imprisonment for kidnapping, and ten years' deferred adjudication for injury to a child. The trial court orally pronounced that the sentences were to be served consecutively. On September 6, 2017, a judgment *nunc pro tunc* was filed relating to cause No. 16-1592-CR-C (Count 1, kidnapping), and on February 2, 2018, a judgment *nunc pro tunc* was filed relating to

cause No. 16-1593-CR-C (Counts 1-3, criminal mischief). Each judgment *nunc pro tunc* included the following stacking order:

Defendant is to serve his sentences for Cause No. 16-1952-CR-C and Cause No. 16-1953-CR-C consecutively. Defendant is ordered to serve Cause No. 16-1593-CR-C first. Defendant shall serve Cause No. 16-1593-CR-C Count 1 first, then Cause No. 16-1593-CR-C Count 2, and finally Cause No. 16-1593-CR-C Count 3 in the Texas Department of Criminal Justice-State Jail Division. Once the sentences are complete for Cause No. 16-1593-CR-C, Defendant will begin his sentence for Cause No. 16-1592-CR-C in the Texas Department of Criminal Justice-ID Division.¹

With regard to cause No. 1592-CR-C (Count 2, injury to a child), the trial court entered an Order of Deferred Adjudication, which does not contain any cumulation language.

In his sole issue on appeal, Schultz contends the trial court erred by cumulating his criminal mischief sentences and asks that the judgments be reformed so that the criminal mischief sentences run concurrently. The State concedes the trial court erred by stacking the three criminal mischief sentences. Because the trial court erred by stacking the criminal mischief sentences, we reform the judgments to delete the cumulation order with regard to the criminal mischief sentences and affirm as reformed.

DISCUSSION

We review a trial court's stacking order for an abuse of discretion. *Byrd v. State*, 499 S.W.3d 443, 446 (Tex. Crim. App. 2016). Usually, that discretion is absolute if the law allows the imposition of cumulative sentences. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (West Supp. 2017). An abuse of discretion occurs if the trial court imposes consecutive sentences where the law requires concurrent sentences. *Byrd*, 499 S.W.3d at 446-47.

¹ We note the trial court's stacking orders incorrectly identify the cause numbers of the underlying cases as 16-1952-CR-C and 16-1953-CR-C.

The Texas Penal Code allows for offenses arising out of the “same criminal episode” to be tried in the same criminal action. TEX. PENAL CODE ANN. § 3.02(a) (West 2011). The Penal Code specifically defines the term “same criminal episode,” as “the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property.” *Id.* § 3.01. The term includes a scenario in which “the offenses are the repeated commission of the same or similar offenses.” *Id.* at § 3.01(2). When offenses are tried together pursuant to Penal Code chapter three, the sentences must run concurrently unless a specific exception within chapter three provides otherwise. *Id.* at § 3.03(a).

Here, each of the three counts of criminal mischief offenses committed by Schultz involved a different victim and different property.² However, all three counts of criminal mischief occurred on the same day, December 1, 2014. Further, each count of criminal mischief alleged Schultz damaged a vehicle by breaking its windows. Because the offenses are similar and allegedly occurred on the same day, they are logically interpreted as part of the same criminal episode. *Id.* at § 3.01(2).

Criminal mischief is not one of the offenses for which stacking is provided under subsection (b); that is, it is not one of the offenses exempted from the concurrent-sentencing requirement of subsection (a). *See id.* Therefore, the trial court abused its discretion by entering a cumulation order stacking the sentences for Schultz’s criminal mischief convictions. *See id.*; *see also Yvanez v. State*, 991 S.W.2d 280, 282-83 (Tex. Crim. App. 1999) (explaining that trial court had discretion to stack sentences for any excepted offenses listed in section 3.03(b) but did not have discretion to stack sentences for offenses not encompassed in section 3.03(b)).

² In Count 2, the damaged vehicle and other property was co-owned by two persons, whereas in Counts 1 and 3, the damaged vehicles were owned by one owner each.

Accordingly, we sustain Schultz's sole issue on appeal and reform the judgments for cause Nos. 16-1592-CR-C and 16-1593-CR-C to delete the portion of each stacking order that orders cause No. 16-1593-CR-C Counts 1 through 3 be served consecutively.

CONCLUSION

We modify the judgments in cause Nos. 16-1592-CR-C and 16-1593-CR-C so that the stacking orders contained in the special findings section read: Defendant is to serve his sentences for Cause No. 16-1592-CR-C and Cause No. 16-1593-CR-C consecutively. Defendant is ordered to serve Cause No. 16-1593-CR-C first. Once the sentences are complete for Cause No. 16-1593-CR-C, Defendant will begin his sentence for Cause No. 16-1592-CR-C in the Texas Department of Criminal Justice-ID Division. We affirm the trial court's judgments as modified.

Irene Rios, Justice

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