

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-18-00158-CR
NO. 09-18-00159-CR
NO. 09-18-00160-CR
NO. 09-18-00161-CR

ANDREAS KARL HENSCHKE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause Nos. 17-09-11090-CR, 17-09-11091-CR,
17-09-11092-CR, 17-09-11095-CR

MEMORANDUM OPINION

Article 102.073 of the Code of Criminal Procedure provides that “[i]n a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only

once against the defendant.”¹ Thus, trial courts may not assess costs more than once when the State tries a defendant in cases consolidated and tried in one proceeding.² The record shows the trial court assessed costs more than once here. In the brief Andreas Karl Henschke filed to support his appeals in Trial Court Cause Numbers 17-09-11090-CR, 17-09-11091-CR, 17-09-11092-CR and 17-09-11095-CR, he argues the trial court erred by assessing court costs against him in all four cases when they were tried in a single proceeding. In its response, the State concedes error.

The record on appeal shows that the trial court assessed \$594 in each of the four judgments at issue in Henschke’s appeals. Court costs are a nonpunitive recoupment of the costs of judicial resources expended in the trial of a case.³ The costs the court assessed are reviewable on appeal to determine “if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost[.]”⁴ A defendant may complain about error in assessing court costs for the first time on appeal.⁵ Here, no dispute exists about whether the cases were tried in a

¹ Tex. Code Crim. Proc. Ann. art. 102.073(a).

² *Hurlburt v. State*, 506 S.W.3d 199, 203 (Tex. App.—Waco 2016, no pet.).

³ *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014).

⁴ *Id.*

⁵ *Id.* at 391.

single proceeding. To remedy the trial court's error, we modify the judgments in three of the four cases to require Henschke to pay costs for the cases tried in a single proceeding only once.⁶

In multiple cases tried together, taxable costs are determined by "using the highest category of offense that is possible based on the defendant's convictions."⁷ Of Henschke's convictions, the highest-category offense is a second-degree felony, which is his conviction for promoting child pornography.⁸ The cost bill in that case reflects the assessable costs were \$594, which is the amount the trial court assessed.

To correct the errors in the judgments in Trial Court Cause Numbers 17-09-11090-CR, 17-09-11091-CR and 17-09-11092-CR, we delete the court costs in those judgments and award \$0 in costs. As modified, the judgments in Trial Court Cause Numbers 17-09-11090-CR, 17-09-11091-CR, and 17-09-11092-CR are affirmed.⁹ We affirm the judgment the trial court issued on Henschke's promotion of child pornography case, Trial Court Cause Number 17-09-11095-CR.¹⁰

⁶ *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013).

⁷ Tex. Code. Crim. Proc. Ann. art. 102.073(b).

⁸ See Tex. Penal Code Ann. § 43.26(g).

⁹ See Tex. R. App. P. 43.2(b).

¹⁰ *Id.* 43.2(a).

AFFIRMED AS MODIFIED.

HOLLIS HORTON
Justice

Submitted on November 19, 2019
Opinion Delivered January 15, 2020
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.