

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

---

**NO. 09-20-00014-CR**  
**NO. 09-20-00015-CR**  
**NO. 09-20-00016-CR**  
**NO. 09-20-00017-CR**  
**NO. 09-20-00018-CR**

---

**BRIAN RAY MIDDLETON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the 253rd District Court**  
**Liberty County, Texas**  
**Trial Cause Nos. CR31225, CR31226, CR31227, CR34574, CR34752**

---

**MEMORANDUM OPINION**

Pursuant to a plea bargain agreement, appellant Brian Ray Middleton entered pleas of guilty to theft of property greater than \$20,000 but less than \$100,000 in cause number CR31225, theft of property greater than \$1,500 but less than \$20,000 in cause number CR31226, and theft of property greater than \$1,500 but less than

\$20,000 in cause number CR31227.<sup>1</sup> *See* Tex. Penal Code Ann. § 31.03(e)(4)(A), (5).<sup>2</sup> The trial court found the evidence sufficient to find Middleton guilty, but deferred further proceedings, and placed Middleton on community supervision for ten years in all three cases. Before the completion of the community supervision period, the State filed a motion to revoke in each of the three cause numbers. In its Motion to Revoke Unadjudicated Community Supervision, the State alleged among other violations, that Middleton committed two new criminal acts of theft while on community supervision. Middleton entered pleas of guilty to each of the new charges alleged by the State: (1) theft of property greater than \$2,500 but less than \$30,000 in cause number CR34752; and (2) theft of property greater than \$2,500 but less than \$30,000 in cause number CR34574.

As a result of his pleas, the trial court found Middleton violated the conditions of his community supervision in cause numbers CR31225, CR31226, and CR31227. The trial court also found Middleton guilty of theft of property greater than \$2,500 but less than \$30,000 in cause numbers CR 34752 and CR 34574. The trial court assessed punishment at two years in a state jail facility for each of the five cause

---

<sup>1</sup> In cause number CR31225, there was an agreement regarding restitution that lowered the offense charged to the lesser included offense alleged in the indictment. The parties agreed that this charge would be a state jail felony and not a third-degree felony.

<sup>2</sup> We cite to the current version of the Penal Code provisions, as the amendments made to the cited statutes do not affect this appeal.

numbers and ordered that Middleton's sentences were to run consecutively to each sentence in cause numbers CR31225, CR31226, CR31227, CR34574, and CR34752.

In his sole appellate issue, Middleton argues that the cumulation order in the judgments is prohibited and the judgments should be reformed because the cases arise from the same criminal episode. As such, the trial court was prohibited from ordering his sentences to run consecutively pursuant to Section 3.03 of the Texas Penal Code. *See id.* § 3.03. We affirm the trial court's judgment as modified.

### **Analysis**

The record indicates that at the initial hearing on Middleton's three original theft charges, the trial court did not call the cause numbers separately when asking Middleton his plea to the three theft charges, and Middleton pled guilty to the offenses simultaneously. At the same hearing, the trial court accepted Middleton's plea agreement and sentenced Middleton for cause numbers CR31226 and CR31227, dealing with each cause before proceeding to the next cause number.<sup>3</sup> At the revocation hearing, the trial judge sentenced Middleton without calling the five cause numbers separately and without adjudicating one cause before proceeding

---

<sup>3</sup> At the original plea hearing, the trial court deferred finding guilt in cause number CR31225 until the amount of restitution was determined. The trial court later accepted the plea in cause number CR31225 and sentenced Middleton to deferred adjudication.

with the next. When sentencing Middleton, the trial judge purported to order as follows:

THE COURT: All right. Mr. Middleton, stand at this time. I find that you did violate the terms and conditions of probation in 31225, 31226, 31227, and that you are guilty of the offenses as charged in 34574 and 34752. In each case, the Court is ordering that you spend two years in a state jail facility. The Court is further ordering that after you complete the sentence of two years in 31225, that you then serve the sentence of two years in 31226, and upon the completion of that sentence, that you serve the two years assessed in 31227, and then upon the completion of that sentence, that you complete the sentence in . . . 34574, and then upon the completion of that sentence, then you complete the two years in 34752. So, in other words, these are consecutive sentences. I don't see that there's any impediment to it in 42.08. You need to stay in the pen as long as you can so you don't defraud other people. You just have no conscience at all, it appears. Good luck to you, Mr. Middleton. You are remanded to the sheriff for further imposition of sentence.<sup>4</sup>

A trial court may order sentences to run consecutively or concurrently. *See* Tex. Code Crim. Proc. Ann. art. 42.08. However, the trial court's discretion is limited by section 3.03 of the Penal Code, which provides:

When the accused is found guilty of more than one offense *arising out of the same criminal episode* prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

Tex. Penal Code Ann. § 3.03(a) (emphasis added).

---

<sup>4</sup> Although Middleton did not object to the trial court's sentencing, he did not waive our review on appeal because "[section] 3.03 confers a *Marin* waiver-only right—a right that must be implemented unless affirmatively waived." *Ex parte Carter*, 521 S.W.3d 344, 347 (Tex. Crim. App. 2017) (citations omitted).

A defendant is prosecuted in a single criminal action whenever the allegations and evidence of more than one offense arising out of the same criminal episode are presented in a single trial or plea proceeding, and the provisions of section 3.03 of the Penal Code apply. *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992), *overruled on other grounds by Ex parte Carter*, 521 S.W.3d 344, 347 (Tex. Crim. App. 2017); *see also* Tex. Penal Code Ann. § 3.01 (defining repeated commission of the same or similar offenses as a criminal episode). Because Middleton’s cases involved repeated commission of the same offense, i.e., theft, his crimes are said to arise out of the same criminal episode as defined by section 3.01, regardless if they were committed against different victims at different times. *See Cazarez v. State*, 606 S.W.3d 549, 563 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (quoting Tex. Penal Code Ann. § 3.01(2)) (rejecting the State’s argument that the offenses are not the same criminal episode as defined under section 3.01 because although they involved different complainants and different time periods, “section 3.01 does not require identical offenses—they must merely be ‘repeated commissions of the same or similar offenses’”); *see also Miranda v. State*, Nos. 03-13-00103-CR, 03-13-00182-CR, 03-13-00183-CR, 03-13-00184-CR, 03-13-00185-CR, 2014 WL 2957794, at \*2 (Tex. App.—Austin June 24, 2014, no pet.) (mem. op., not designated for publication) (explaining that although the appellant’s thefts happened at different times over the course of two years, “the thefts were still

repeated commissions of the same or similar offenses[,]” and arose out of the same criminal episode).

Additionally, section 3.03(b) enumerates the offenses that may be ordered to run consecutively. *See* Tex. Penal Code Ann. § 3.03(b). Middleton’s crimes of theft under section 31.03 of the Texas Penal Code are not expressly included in that list. *See id.* § 31.03(e)(4)(A); *see also Parfait v. State*, 120 S.W.3d 348, 350 (Tex. Crim. App. 2003) (noting that section 3.03(b) has the list of offenses for which sentences may run consecutively and if a crime is not on that enumerated list, “it is not for us to add or subtract to that which the Legislature has expressed”). Thus, the trial court’s authority to cumulate sentences is expressly limited by the statute. *See Mayo v. State*, 321 S.W.3d 576, 583 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Finally, the trial court erred in cumulating Middleton’s sentences because, although the plea hearing addressed each cause separately, the revocation hearing did not address each cause separately. *In Robbins v. State*, the Court of Criminal Appeals addressed this exact scenario and held the trial court erred by cumulating the appellant’s sentences.

Although Appellant entered separate pleas of guilty to each indictment, the trial court held a consolidated punishment hearing. A plea proceeding is not complete until punishment has been assessed. Had the trial court accepted the plea and rendered sentence in one cause prior to hearing the plea and rendering sentence in the other, we would agree with the Court of Appeals that the trial court “fully completed one plea proceeding before starting the other.” However, the consolidated

punishment hearing defeated the State’s and trial court’s attempts to comply with the provisions of § 3.03, of the Penal Code.

914 S.W.2d 582, 583–84 (Tex. Crim. App. 1996) (citations omitted); *see also Cazarez*, 606 S.W.3d at 564 (explaining the trial court erred when it ordered the appellant’s sentences to run consecutively because “the two theft offenses were prosecuted jointly”).

Because we conclude that Middleton’s offenses were part of the same criminal episode, not expressly listed in 3.03(b) allowing cumulative sentences, and because the charges were prosecuted jointly, we sustain Middleton’s sole issue. *See Robbins*, 914 S.W.2d at 583–84.; *see also LaPorte*, 840 S.W.2d at 415. Accordingly, we modify the trial court’s judgments in each of trial cause numbers CR31225, CR31226, CR31227, CR34574, and CR34752 by modifying the first page of each judgment to reflect that the sentences shall run concurrently and by deleting the cumulation order that appears on the third page of each judgment.

AFFIRMED AS MODIFIED.

---

CHARLES KREGER  
Justice

Submitted on August 11, 2020  
Opinion Delivered November 25, 2020  
Do Not Publish

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