



**In the  
Court of Appeals  
Second Appellate District of Texas  
at Fort Worth**

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No. 02-19-00318-CR

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JOEL ENGOBO MAMBE, Appellant

v.

THE STATE OF TEXAS

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On Appeal from the 396th District Court  
Tarrant County, Texas  
Trial Court No. 1550893D

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Before Wallach, Gabriel, and Kerr, JJ.  
Per Curiam Memorandum Opinion

## MEMORANDUM OPINION

Appellant Joel Engobo Mambe judicially confessed and pled guilty without the benefit of a bargain to an indictment purporting to charge him with committing aggravated sexual assault by, among other things, “intentionally or knowingly caus[ing his] sexual organ to contact the [adult complainant’s] mouth . . . and . . . us[ing] or exhibit[ing] a deadly weapon, namely a firearm, in the course of the same criminal episode.” In a single proceeding involving two other offenses separately alleged against Mambe,<sup>1</sup> the trial court convicted him of aggravated sexual assault and sentenced him to sixty years’ confinement, with the sentence to run concurrently with his sentences in the other two cases. The trial court assessed costs in all three cases.

In the sole issue in his initial brief, Mambe contends that the trial court should not have imposed costs in this case because when cases are tried together, only one assessment of costs is permitted. In his second issue, raised in supplemental briefing requested by this court, Mambe contends that his conviction is void because he was convicted of aggravated sexual assault, a first-degree felony, but charged only with aggravated assault, a second-degree felony. Mambe asks that we (1) modify the

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<sup>1</sup>The trial court heard two other felony cases in the same proceeding as this case. This court affirmed the trial court’s judgment in trial court cause number 1550888D (appellate cause number 02-19-00317-CR) and affirmed as modified the trial court’s judgment in trial court cause number 1550895D (appellate cause number 02-19-00319-CR). *Mambe v. State*, Nos. 02-19-00317-CR, 02-19-00319-CR, 2020 WL 2071943, at \*2 (Tex. App.—Fort Worth Apr. 30, 2020, no pet.) (mem. op., not designated for publication).

judgment to reflect a conviction for aggravated assault—not aggravated sexual assault—and to remove court costs and (2) remand the case to the trial court for sentencing. The State agrees. Accordingly, we modify the trial court’s judgment (1) to replace Mambe’s conviction for aggravated sexual assault with a conviction for aggravated assault and (2) to remove the previously assessed court costs. We affirm those portions of the judgment as modified. We reverse the trial court’s judgment as to the sixty-year sentence and remand this case to the trial court solely to conduct a new punishment hearing and to sentence Mambe within the permissible range for his second-degree-felony conviction.

## **I. BRIEF FACTS<sup>2</sup>**

Mambe’s three cases stemmed from the June 2018 aggravated kidnapping, aggravated robbery, and aggravated sexual assault of a college student. The presentence investigation report considered in the sentencing hearing shows that Mambe took the complainant from her apartment complex parking lot at gunpoint and forced her to drive to a bank to withdraw money for him; to another apartment complex parking lot where he forced her to perform oral sex on him; to a convenience store where he used her debit card to buy some items; and finally to a third apartment complex where he got out of the car, taking her debit card with him. Mambe was later arrested.

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<sup>2</sup>Because the facts are not at issue in this appeal, we omit a detailed recitation of the evidence.

This case concerns Mambe’s sexual crimes against the complainant. The grand jury indicted him on two counts, charging that Mambe

without the [complainant’s] consent . . . , by compelling [her] to submit or participate by the use of physical force or violence, intentionally or knowingly caused [his] sexual organ . . . to contact [her] mouth . . . , and [he] used or exhibited a deadly weapon, namely a firearm, in the course of the same criminal episode,

Count Two: And . . . [Mambe] . . . without the [complainant’s] consent . . . , by compelling [her] to submit or participate by threatening to use force or violence against [her], and the complainant believed [that Mambe] had the present ability to execute the threat, intentionally or knowingly caused [his] sexual organ to contact [her] mouth . . . , and [Mambe] used or exhibited a deadly weapon, namely a firearm, in the course of the same criminal episode[.]

No record was taken of the guilty-plea hearing. In his open-plea papers, which show that the State was proceeding on Count One, Mambe judicially confessed to committing the acts “alleged in the indictment.” In the sentencing hearing, the trial court stated, “Let the record reflect that on April the 24th of this year [(2019), Mambe] came to court and pled . . . to the offense[] of aggravated . . . sexual assault.” The written judgment reflects a conviction and sentence for aggravated sexual assault.

## **II. DISCUSSION**

### **A. Mambe’s Conviction and Sentence**

After Mambe appealed, this court requested supplemental briefing. We were concerned that the indictment, by alleging contact of Mambe’s sexual organ with the adult complainant’s mouth instead of alleging penetration of her mouth by his sexual organ, appeared not to charge aggravated sexual assault (or, for that matter, sexual

assault). We were therefore also concerned that Mambe did not judicially admit or plead guilty to aggravated sexual assault and that he could not have been properly convicted of that unindicted offense.

Mambe contends in his second issue that his aggravated sexual assault conviction is void because the indictment charged aggravated assault, not aggravated sexual assault, and that his sentence, which falls outside the range of punishment for a second-degree felony, is also void. When an indictment charges a complete offense, the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense. *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994). Both Penal Code Section 22.011(a)(1)(B) (governing sexual assault by penetration of the mouth of a complainant who is seventeen or older with a defendant's sexual organ) and Section 22.021(a)(1)(A)(ii) (governing aggravated sexual assault by penetration of the mouth of a complainant who is seventeen or older with a defendant's sexual organ) require penetration, not mere contact. Tex. Penal Code Ann. §§ 22.011(a)(1)(B), 22.021(a)(1)(A)(ii); *cf. Metcalf v. State*, 597 S.W.3d 847, 857 (Tex. Crim. App. 2020) (holding sexual assault is a nature-of-conduct offense); *Gonzalez v. State*, 304 S.W.3d 838, 848–49 (Tex. Crim. App. 2010) (holding aggravated sexual assault is a nature-of-conduct offense). Contact of a defendant's sexual organ with an adult complainant's mouth is not a sexual assault under the statutes.<sup>3</sup> Thus,

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<sup>3</sup>Indecent assault was not yet an offense when Mambe committed his crimes. *See* Tex. Penal Code Ann. § 22.012 (effective September 1, 2019).

the indictment did not charge aggravated sexual assault (or sexual assault) and did not authorize a conviction for either, *see Sierra v. State*, 501 S.W.3d 179, 185 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding indictment alleging burglary by concealment did not authorize burglary of a habitation). The trial court therefore erred by convicting Mambe of aggravated sexual assault. *See Thomason*, 892 S.W.2d at 11.

What crime did Mambe plead guilty to? When Mambe judicially confessed and pled guilty to committing the acts alleged in the indictment, he admitted contact, not penetration. Mambe maintains that the indictment alleged and that he pled guilty to simple assault by contact, aggravated by the use or exhibition of a deadly weapon. The State agrees, and we so hold. *See Tex. Penal Code Ann.* §§ 22.01(a)(3), 22.02(a)(2). Aggravated assault is a second-degree felony. *Id.* § 22.02(b). The maximum term of confinement for a second-degree felony is twenty years. *Id.* § 12.33(a).

Mambe's sixty-year sentence is outside the permissible range for a second-degree felony; it is therefore illegal and void. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003); *Ex parte Pena*, 71 S.W.3d 336, 336 n.2 (Tex. Crim. App. 2002). When a defendant pleads guilty without the benefit of a bargain and the trial court assesses a punishment unauthorized by law, the proper remedy is to remand the case to the trial court for the proper assessment of punishment. *Levy v. State*, 818 S.W.2d 801, 803 (Tex. Crim. App. 1991). The parties agree that we should remand this case to the trial court for a new punishment hearing. Because the

aggravated sexual assault conviction and the sixty-year sentence are not authorized by the indictment, we sustain Mambe’s second issue.

### **B. Costs**

In his first issue, Mambe contends that the trial court should not have imposed costs in this case because when cases are tried together, only one assessment of costs is permitted. The trial court assessed costs in all three of Mambe’s cases instead of assessing them in only one case. As we explained in our opinion disposing of Mambe’s other two cases,

By statute, “(i)n a single criminal action in which a defendant is convicted of two or more offenses . . . , the court may assess each court cost or fee only once against the defendant.” Tex. Code Crim. Proc. Ann. art. 102.073(a). The phrase “a single criminal action” used in the statute includes a trial on multiple offenses, like the one in this case, regardless of whether the offenses were committed in a single criminal episode. *Guerin v. State*, Nos. 02-18-00509-CR, 02-18-00510-CR, 2019 WL 4010361, at \*1 (Tex. App.—Fort Worth Aug. 26, 2019, no pet.) (mem. op., not designated for publication); see *Hernandez v. State*, Nos. 02-17-00300-CR, 02-17-00301-CR, 02-17-00302-CR, 2018 WL 2346970, at \*3 (Tex. App.—Fort Worth May 24, 2018, pet. ref’d) (mem. op., not designated for publication).

“When a trial court erroneously assesses court costs for multiple convictions tried in a single proceeding, we retain the court costs for the offense of the highest category.” *Guerin*, 2019 WL 4010361, at \*1 (citing Tex. Code Crim. Proc. Ann. art. 102.073(b)).

*Mambe*, 2020 WL 2071943, at \*1. We sustain Mambe’s first issue. We retained the costs for the first-degree felony with the lowest cause number, trial court cause number 1550888D (appellate cause number 02-19-00317-CR). *Id.* at \*2. Accordingly,

in this case, we modify the trial court's judgment to remove the previously assessed court costs. *See id.*

### III. CONCLUSION

Having sustained Mambe's two issues, we modify and affirm as modified in part, and we reverse and remand in part. We modify the trial court's judgment (1) to delete Mambe's conviction for aggravated sexual assault and to replace it with a conviction for aggravated assault and (2) to remove the assessed court costs. We affirm those portions of the judgment as modified. We reverse the trial court's judgment as to sentencing and remand this case to the trial court solely to conduct a new punishment hearing and to sentence Mambe within the permissible range for his second-degree-felony conviction for aggravated assault.

Per Curiam

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