



NUMBER 13-17-00028-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JIMMIE ALEN HILL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 424th District Court
of Blanco County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez**

Appellant Jimmie Alen Hill appeals his conviction for evading arrest, with enhancements, for which the trial court sentenced him to ten years in prison. See TEX. PENAL CODE ANN. § 38.04(a), (b)(1) (West, Westlaw through Ch. 49, 2017 R.S.). By four issues, Hill contends that: (1) the evidence does not support the trial court's award of

attorney's fees against him; (2) there is no statutory basis for the trial court's assessment of jury service fees against him; and (3–4) the judgment contains errors that should be corrected. We affirm as modified.¹

I. BACKGROUND

Pursuant to an open plea, Hill pleaded guilty to evading arrest or detention. See *id.* He also pleaded true to two enhancements—two prior state jail felony convictions for theft. The trial court sentenced Hill to ten years' imprisonment. The judgment also set out the following “special finding[] or order[]”: “DEFENDANT ACKNOWLEDGED HIS ABILITY TO PAY COURT APPOINTED ATTORNEY FEES IN THE AMOUNT OF \$875.00 IN PERIODIC PAYMENTS.” And the bill of costs identified, among other costs, a “JURY SRV FEE CRIM STATE \$5.40” and a “JURY SRV FEE CRIM COUNTY \$.60.” This appeal followed.

II. ATTORNEY'S FEES

By his first issue, Hill contends that the evidence is insufficient to support the trial court's decision to order him to pay court-appointed attorney's fees of \$875. Hill asserts that the evidence is insufficient to show his ability to pay the fees. The State replies that it neither joins nor opposes the reformation of the judgment to remove the order for payment of court-appointed attorney's fees.

Texas Code of Criminal Procedure article 26.05(g) allows the trial court to order a defendant to re-pay costs of court-appointed legal counsel that the court finds the

¹ This case is before the Court on transfer from the Third Court of Appeals in Austin pursuant to an order issued by the Supreme Court of Texas. See TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through Ch. 49, 2017 R.S.).

defendant is able to pay. TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West, Westlaw through Ch. 49, 2017 R.S.). Under article 26.05(g), “the defendant’s financial resources and ability to pay are explicit critical elements in the trial court’s determination of the propriety of ordering reimbursement of costs and fees.” *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010); see also *Blackard v. State*, No. 03-15-00819-CR, 2016 WL 4506160, at *2 (Tex. App.—Austin Aug. 25, 2016, no pet.) (mem. op., not designated for publication) (following *Mayer* and providing that “there must be evidence in the record supporting those elements”). So, before ordering the re-payment of court-appointed fees, “[a]rticle 26.05(g) requires a present determination of financial resources.” *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). It “does not allow speculation about possible future resources.” *Id.* Finally, a finding or determination under article 26.05(g) must be supported by sufficient evidence. *Mayer*, 309 S.W.3d at 556; see *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (setting out that under the sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”).

Our review of the record reveals no evidence to support a “present determination” of Hill’s financial resources or his ability to pay the challenged court-appointed attorney’s fees. See *Cates*, 402 S.W.3d at 252; see also *Mayer*, 309 S.W.3d at 556. Instead, any present determination would appear to have supported the contrary, for it is undisputed that Hill was indigent and that the trial court appointed counsel to represent Hill at the trial

level and on appeal.² See TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(1) (West, Westlaw through Ch. 49, 2017 R.S.) (authorizing a judge to appoint counsel for an indigent defendant); *Massingil v. State*, 8 S.W.3d 733, 737 (Tex. App.—Austin 1999, pet. ref'd) (“[A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.”) (internal quotations omitted). We do note that Hill acknowledged he had the ability to pay the assessed fees when he was released from prison,³ but this acknowledgement was based on speculation about possible future resources; it provided no support for any determination that Hill had the present ability to pay his court-appointed attorney’s fees of \$875. See *Cates*, 402 S.W.3d at 252; *Mayer*, 309 S.W.3d at 556; see also *Jackson v. State*, No. 03-16-00341-CR, 2017 WL 744194, at *2 & n.3 (Tex. App.—Austin Feb. 23, 2017, no. pet. h.) (mem. op., not designated for publication) (deleting attorney’s fees and observing that a present ability to pay is required while noting that “[d]uring the punishment hearing, Jackson testified that his financial situation might improve because he was feeling healthier, because he was finally on disability, and because a manager at a retail store suggested that she might be able to give him a part-time position”).

In sum, the trial court determined Hill to be indigent. The evidence, if any, only allowed for speculation about Hill’s possible future resources. See *Cates*, 402 S.W.3d

² Our review of the record reveals that the trial court assessed no fine, explaining that it did not see “any way that [Hill] was going to pay it, and if [Hill] were able to pay something, it need[ed] to go to [his] kids.”

³ Hill signed a “Felony Waivers, Confession, and Agreement” that contained the following language: “If my attorney is appointed by the Court, I acknowledge that I have the ability to reimburse the county for court-appointed attorney fees, assessed, either in full or by periodic partial payments, upon release on community supervision or upon release from incarcerations.”

at 252. We conclude that there was no evidentiary basis to support a present determination of Hill's financial resources from which he could pay his court-appointed attorney's fees. See *Mayer*, 309 S.W.3d at 556; see also *Jackson*, 443 U.S. at 319. The parties are correct that the proper remedy is to reform the trial court's judgment by deleting the \$875 in court-appointed attorney's fees from the judgment. We sustain Hill's first issue.

III. JUDICIAL SUPPORT FEES

By his second issue, Hill contends that there is no statutory basis for the jury service fees, totaling \$6, imposed in this case. See *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014) (noting that we review "the assessment of court costs 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, and traditional *Jackson* evidentiary-sufficiency principles do not apply"). The December 14, 2016 bill of cost did assess this fee. But the State has informed this Court that the complained-of fee set out in the December bill of costs was inaccurately labeled and has now been corrected to reflect a judicial support fee in that amount, as mandated by statute. See TEX. LOC. GOV'T CODE ANN. § 133.105(a) (West, Westlaw through Ch. 49, 2017 R.S.) ("A person convicted of any offense, other than an offense relating to a pedestrian or the parking of a motor vehicle, shall pay as a court cost, in addition to all other costs, a fee of \$6 to be used for court-related purposes for the support of the judiciary."); *Johnson*, 423 S.W.3d at 390. The supplemental clerk's record contains the March 30, 2017 first amended bill of costs that correctly labels that statute-based fee. See TEX. LOC. GOV'T CODE ANN. § 133.105;

Houston v. State, 410 S.W.3d 475, 477–80 (Tex. App.—Fort Worth 2013, no pet.) (reviewing the law of court costs and determining that the bill of costs found in the supplemental court reporter’s record was evidence supporting the trial court’s assessment of \$570 in court costs). Because Hill’s second issue is moot, we overrule it.

IV. CLERICAL ERRORS IN THE JUDGMENT

A. A State Jail Felony, Not a Third-Degree Felony

By his third issue, Hill complains that the judgment incorrectly describes the level of his offense as a third-degree felony, when it should be shown as a state jail felony. The State agrees that the relief requested is appropriate and necessary.

Here, the basic offense is ordinarily a Class A misdemeanor, but because of Hill’s prior conviction under the same statute, his offense was instead a state jail felony. See TEX. PENAL CODE ANN. § 38.04(b)(1). An offense under section 38.04 may, under certain circumstances, be charged as a third-degree felony or even a second-degree felony—but those circumstances are not present here. See *id.* § 38.04(b)(2)–(3). Hill did not use a vehicle, watercraft, or tire deflation device, and no one suffered serious bodily injury or death. See *id.* So, under section 38.04, Hill’s base offense was a state jail felony. See *id.* § 38.04(b)(1).

We note that because of Hill’s two prior final convictions for state jail felonies, his offense was punishable as a third-degree felony under section 12.425(a). See *id.* § 12.425(a) (West, Westlaw through Ch. 49, 2017 R.S.) (“If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two state jail felonies punishable under Section 12.35(a), on conviction

the defendant shall be punished for a felony of the third degree.”). But section 12.425 of the Texas Penal Code only increases the range of punishment for the offense; it does not elevate the severity level of the offense to a third-degree felony. See *id.*; *Ford v. State*, 334 S.W.3d 230, 234 & n.39 (Tex. Crim. App. 2011) (noting that section 12.42 of the Texas Penal Code “increases the range of punishment applicable to the primary offense; it does not increase the severity level or grade of the primary offense”); *Bledsoe v. State*, 480 S.W.3d 638, 643 & n.11 (Tex. App.—Texarkana 2015, pet. ref’d) (applying *Ford* to penal code section 12.425 and modifying the judgment to reflect a conviction for a state jail felony). Based on the above, we agree that the judgment, reflecting a third-degree felony, is inaccurate and should be reformed to reflect a state jail felony. See *Bigley*, 865 S.W.2d at 27–28; *French*, 830 S.W.2d at 609; *Ford*, 334 S.W.3d at 234 & n.39; *Bledsoe*, 480 S.W.3d at 643 & n.11. We sustain Hill’s third issue.

B. Omitted Information

In his fourth issue, Hill argues that the judgment contains two omissions and requests that the Court reform the judgment to include the omitted information. The State of Texas agrees that this requested relief is appropriate and necessary and joins Hill in requesting that we reform the judgment under “Statute for Offense” to show penal code section 38.04(a) and section 38.04(b)(1)(A). The State of Texas also joins Hill in requesting that this Court reform the judgment under “Plea to Second Enhancement/Habitual Paragraph” to show a plea of “True” and to further reform the judgment under “Findings on Second Enhancement/Habitual Paragraph” to show a finding of “True.” After reviewing the record, we agree and sustain Hill’s fourth issue.

V. CONCLUSION

We modify the judgment (1) to delete the special finding or order that provides the following: “DEFENDANT ACKNOWLEDGED HIS ABILITY TO PAY COURT APPOINTED ATTORNEY FEES IN THE AMOUNT OF \$875.00 IN PERIODIC PAYMENTS”; (2) to reflect that Hill was convicted of a state jail felony; (3) to include section 38.04(a) and 38.04(b)(1)(A) under “Statute for Offense”; and (4) to reflect a plea of “True” under “Plea to Second Enhancement/Habitual Paragraph” and a finding of “True” under “Findings on Second Enhancement/Habitual Paragraph.” We affirm the judgment as modified.

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
15th day of June, 2017.