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Nos. PD-0942-17
PD-0943-17
PD-0944-17
PD-0945-17
PD-0946-17
PD-0947-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ANDREY MARTINEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Hidalgo County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Andrey Martinez.

* The trial judges were Hon. Manuel Banales (May 17, 2016), Hon. Romeo Flores (May 31, 2016), Hon. Bonner Dorsey (June 21, 2016), and Hon. Fidencio Guerra, Jr. (June 16, 2016 and July 7, 2016).

* Counsel for Appellant at trial was Aurelio Garza, Jr., 5123 N. McColl Rd., McAllen, TX 78504.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ANDREY MARTINEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

To be meritorious, involuntary plea claims based on a misrepresentation require proof that the misrepresentation induced the defendant's plea. That is why they are seldom successful on direct appeal. This claim is no different. While the attorneys and judge were wrong about a point of law—whether Appellant's sentences could be stacked in that proceeding—more is needed than the plea colloquy for their misunderstanding to render his plea involuntary.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

In a single proceeding, Appellant entered an open plea of guilty to the trial court to nine counts of burglary of a building alleged in six indictments. 9 RR 8-9.[1] Because these offenses were "the repeated commission of the same . . . offense[]," they could not be stacked in a single criminal action. TEX. PENAL CODE §§ 3.01, 3.03. Apparently unaware of this provision, the trial court stacked several of the sentences. Instead of striking the cumulation order (which would have been proper), the court of appeals held this misunderstanding rendered Appellant's guilty pleas involuntary.

STATEMENT OF PROCEDURAL HISTORY

In an unpublished opinion, the court of appeals reversed and remanded all nine convictions. *Martinez v. State*, Nos. 13-16-00456-CR through 13-16-00461-CR, 2017 Tex. App. LEXIS 7059 (Tex. App.—Corpus Christi-Edinburg July 27, 2017)

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[1] Although separately transcribed, the relevant hearings in each cause are the same. For simplification, the State will cite to the reporter's record in Cause CR-1181-16-I, Appellate Cause 13-16-00456-CR. Where the records differ, the State will specify the shortened trial cause number, *e.g.*, "1181 CR" or "1181 RR Vol. 10."

(not designated for publication). No motion for rehearing was filed. This Court granted the State an extension to file this petition by September 27, 2017.

GROUND FOR REVIEW

Are misstatements during a plea colloquy that a defendant's sentences could be stacked enough to render a defendant's plea involuntary without any record of what the defendant knew and why he pleaded guilty?

ARGUMENT

Background

Appellant broke into thirteen strip-center businesses on four days in a seven-month period. 1181 CR 5; 1443 CR 4; 1444 CR 5; 1445 CR 5; 1485 CR 5; 1486 CR 4. He would force entry through a vacant store, knock holes in the neighboring stores' sheetrock, and crawl through to circumvent their alarm systems. 10 RR 16. Appellant was captured on video near a string of five of the burglaries, and Appellant's mother turned over a backpack of stolen cell phones from another. 1181 RR Exhibit Vol. at 92, 101-104; 1443 RR Exhibit Vol. at 37.

The State offered concurrent, thirteen-month state-jail sentences, and Judge Guerra "strongly suggest[ed]" on the record that Appellant take the deal, telling Appellant "if you open it up to me, I'm going to max you" and telling his counsel, "you tell him . . . if it were to go to me two years on each one stacked." 7 RR 4-5, 8.

Appellant agreed to the bargain at the next setting, but a different judge rejected the agreement, explaining "you've got a professional burglar here" and "if I accepted any pleas on those, I will start stacking sentences. I would not run them all concurrent." 8 RR 20. The prosecutor commented that Appellant would get a longer sentence if he took the cases to trial and that the sentences could be stacked. 8 RR 25. The trial court added, "they can always be stacked because they're not of the same—" and the prosecutor interrupted, saying "Right." 8 RR 25-26.

Appearing again before Judge Guerra two weeks later, Appellant entered open pleas of guilty in a joint hearing on all the cases. 9 RR 8-13. The trial court admonished Appellant—wrongly and without contradiction from the parties—that he could cumulate the sentences. 9 RR 8-9, 13. The judge sentenced Appellant to the maximum of two years in state jail on each offense, TEX. PENAL CODE §§ 12.35(a), 30.02(c)(2), asked for argument from the parties on stacking, and then cumulated some of the sentences.[2] 9 RR 20, 27-28.

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[2] Four counts in Cause CR-1181-16-I were unadjudicated and considered in sentencing. *See* TEX. PENAL CODE § 12.45; 1181 CR 21, 23, 25, 27. The trial judge ran the burglaries in the multi-count indictments concurrently with each other and purported to stack the single-count indictments. 9 RR 27. But nothing indicated the order in which the stacked sentences were to be served. Neither the trial court's oral pronouncement nor the judgments state that any particular sentence is to begin when another ceases to operate. *See* TEX. CODE CRIM. PROC. art. 42.08(a); 1181 CR 33; 1443 CR 15; 1444 CR 18, 23; 1445 CR 21, 26, 28; 1485 CR 17; 1486 CR 16.

On appeal, Appellant challenged the cumulation orders and alleged his pleas were involuntary. Appellant's Court of Appeals Brief in Cause 1181 at 33-39 & 50-54. The State responded that the unauthorized cumulation orders should be deleted, prompting the court of appeals's comment: "the situation in this case is more complicated." *Martinez*, slip op. at 16. Although there had been no motion-for-new-trial hearing or development of the record beyond the pretrial hearings and plea colloquies, the court of appeals held that the misunderstanding about stacking rendered Appellant's open plea involuntary. *Id.* at 16-17.

Discussion

Is Appellant's guilty plea involuntary on this record?

Appellant failed to meet his burden of proving his plea involuntary

Under *Boykin v. Alabama*, an unadmonished and unprobed plea of guilty is presumed involuntary; the record must affirmatively show the defendant understands what the plea connotes and its consequence, *i.e.*, that by pleading guilty, he is waiving his right against self-incrimination, trial by jury, and confrontation.[3] 395 U.S. 238, 242-43 (1969); *Davison v. State*, 405 S.W.3d 682, 690 (Tex. Crim.

[3] While somewhat unclear what *Boykin* requires the defendant to understand at a minimum—*see Davison*, 405 S.W.3d at 692; *Aguirre-Mata v. State*, 125 S.W.3d 473, 475 (Tex. Crim. App. 2003)—the court of appeals does not purport to find *Boykin* error in this case.

App. 2013). But a record that shows that the defendant had this understanding and was admonished under Code of Criminal Procedure Article 26.13 is *prima facie* evidence that a guilty plea was entered knowingly and voluntarily. TEX. CODE CRIM. PROC. art. 26.13(c); *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (citing *Ex parte Gibauitch*, 688 S.W.2d 868 (Tex. Crim. App. 1985)). The defendant has the burden to demonstrate he did not fully understand the consequences of his plea and that he suffered harm. *Id*.

Here, Appellant was admonished both orally and in writing on the state-jail-felony sentencing range. 1443RR Vol. 8 at 7 (State's Exhibit 1); 1444RR Vol. 8 at 7; 9 RR 6-7, 8. He was told he had the right to a jury trial, to remain silent, and to confront the witnesses, and he waived those rights; defense counsel stated he believed Appellant was aware of the consequences of his plea and understood the admonitions. 1443RR Vol. 8 at 4-6; 1444RR Vol. 8 at 4-6. The trial court inquired into Appellant's mental fitness, that he was satisfied with counsel, and that he had the opportunity to consult with him. 9 RR 6-7. Both in writing and orally, Appellant stated his plea was voluntarily, and the trial court found it voluntary. 1443RR Vol. 8 at 4-6; 1444RR Vol. 8 at 4-6; 9 RR 12. Appellant's sworn statement should have

been a "'formidable barrier'" against a later claim to the contrary.[4] *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006) (quoting *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977)).

Contrary to the court of appeals's decision, the trial court and prosecutor's mistaken belief that Appellant's sentences were always susceptible to stacking was not sufficient to make Appellant's plea involuntary. The voluntariness of a plea can be determined only by considering all the relevant circumstances surrounding it. *Brady v. United States*, 397 U.S. 742, 749 (1970). Here, there are too many unknown circumstances.[5] What did defense counsel tell Appellant about stacking? An assertion in the brief that Appellant was misled (App.'s Cause 1181 Court of Appeals Brief at 53) is inadequate proof of that fact. *See Ex parte Torres*, 483 S.W.3d 35, 49-50 (Tex. Crim. App. 2016) (pleadings and attorney's arguments are not competent evidence). Did stacking factor into his decision to plead guilty or would he have done so anyhow? *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (no proof or allegation Hill would have insisted on going to trial but for counsel's misadvice on parole

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[4] The court of appeals seemed aware of this when it rejected Appellant's other involuntary plea claim as unsubstantiated. *Martinez*, slip op. at n.10.

[5] Meritorious involuntary plea claims seldom arise on direct appeals; motions for new trial hearings and writs of habeas corpus are both "superior to appeal in that the claim may be supported by information from sources broader than the appellate record." *Cooper v. State*, 45 S.W.3d 77, 82 (Tex. Crim. App. 2001).

eligibility); *Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (requiring proof of reasonable probability that the plea offer would have been extended and accepted, and that less severe conviction or sentence would have been imposed). Also, there has been no fact-finding to assess the credibility of Appellant's assertions. *See Rouse v. State*, 300 S.W.3d 754, 762 (Tex. Crim. App. 2009) (where State challenged the court of appeals's resolution of involuntary-guilty-plea claim on bare direct appeal record). The fact that Appellant persisted in pleading guilty, despite being told that the trial court could stack his sentences for a total of 18 years, makes it unlikely that he would have insisted on a trial had he known the trial court could not stack. *See Gibauitch,* 688 S.W.2d at 873. Just as in the first *Martinez* case, the record contains no evidence that tends to indicate appellant was actually harmed or misled in making his determination to enter a guilty plea. 981 S.W.2d at 197.

Instead of insisting on proof, the court of appeals supplied evidence of the relevant circumstances for Appellant:

> Martinez's pleas of guilty were given with this potential outcome in mind [that his sentences could be stacked]. Moreover, crucially, Martinez's decision to plead guilty was taken while he was under the false impression that, were he to plead not guilty and be convicted at trial, cumulation of sentences would be a lawful option for the trial court.
>
> * * * *
>
> Considering the entire record and all the relevant circumstances, we find that Martinez's pleas were involuntary because they were

> based, at least in part, on the misconception that the trial court could validly order his sentences to run consecutively.

Id. at 16-17, 18. The court of appeals overlooks that Appellant's sentences could have been stacked under different circumstances. For example, the parties could include stacking in a plea agreement.[6] *See Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997) (allowing defendant to forgo concurrent sentences under Section 3.03 in a plea agreement). Or, the State could have conditioned its jury waiver approval on successive plea hearings, which also would permit cumulative sentences. *See* TEX. PENAL CODE § 3.03; *Ex parte Pharr*, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995); *LaPorte v. State*, 840 S.W.2d 412, 414 (Tex. Crim. App. 1992) ("single criminal action" means a single trial or plea proceeding), *overruled on other grounds by Ex parte Carter*, Nos. WR-85,060-01 & WR-85,060-02, 2017 Tex. Crim. App. LEXIS 564, at *3, *22 (Keasler, J., plurality, slip op. at 3) & (Newell, J., concurring, slip op. at 2). Since there were multiple legitimate ways to achieve stacked sentences, the trial court's and prosecutor's statements may not have had either the meaning or the impact the court of appeals assumed them to have.

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[6] This would allow Appellant to avoid the potential of multiple stacked sentences if the State opted for consecutive trials or to give notice of enhancement with a prior conviction.

The court of appeals also erred to rely on habeas corpus cases in this situation. *See Martinez*, slip op. at 17-18 (citing *Brady*, 397 U.S. at 747-55 (suit under 28 U.S.C. § 2255); *Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015) (state habeas); and *Ex parte Moussazadeh*, 64 S.W.3d 404, 410 (Tex. Crim. App. 2001) (same)). In habeas, like a motion for new trial, there is an opportunity to develop evidence outside the plea colloquy to substantiate a claim of an involuntary plea based on misinformation. It may be that in a writ, Appellant could actually show his plea was involuntary. *See, e.g.*, *Ex parte Sanchez*, 475 S.W.3d 287, 288 (Tex. Crim. App. 2015); *Ex parte Harrington*, 310 S.W.3d 452, 459-60 (Tex. Crim. App. 2010); *Ex parte Moody*, 991 S.W.2d 856, 859 (Tex. Crim. App. 1999). But it is premature to so hold now.

While it may be tempting to overlook procedural irregularities if the ultimate outcome is not in doubt, this kind of claim is no foregone conclusion. *See Ex parte Jackson*, Nos. WR-75,001-01, 2011 Tex. Crim. App. Unpub. LEXIS 9, at *2-3 (Tex. Crim. App. Jan. 12, 2011) (not designated for publication) (rejecting claim that applicant's plea was involuntary even if prosecutor misrepresented his parole eligibility to defense counsel). As is repeatedly shown in *Padilla v. Kentucky*[7] claims, defendants frequently decide to plead guilty for reasons entirely independent

[7] 559 U.S. 356 (2010).

of any misadvice they have received. *See Ex parte Obi*, 446 S.W.3d 590, 601 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *Ex parte Luna*, 401 S.W.3d 329, 336 (Tex. App.—Houston [14th Dist.] 2013, no pet.). "Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." *Brady*, 397 U.S. at 756. The court of appeals was wrong to hold a plea involuntary on an undeveloped record.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals finding his pleas involuntary, strike the improper cumulation orders, and otherwise affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2039 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of September 2017, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals's Opinion

NUMBERS 13-16-00456-CR, 13-16-00457-CR, 13-16-00458-CR, 13-16-00459-CR, 13-16-00460-CR, AND 13-16-00461-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ANDREY CARDIEL MARTINEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 398th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

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

In six separate indictments, appellant Andrey Cardiel Martinez was charged with a total of thirteen counts of burglary of a building, each a state jail felony. *See* TEX. PENAL CODE ANN. § 30.02(c)(1) (West, Westlaw through Ch. 49, 2017 R.S.). Martinez pleaded guilty and was convicted and sentenced to two years' confinement in state jail for nine of

those offenses, with several of the sentences ordered to run consecutively. Martinez brings six separate appeals, one corresponding to each trial court cause number, arguing that: (1) the trial court erred in ordering the sentences to run consecutively; (2) the State violated a plea agreement; (3) his guilty pleas were involuntary; and (4) his trial counsel provided ineffective assistance.

Because the trial court, prosecutors, and defense counsel each represented that Martinez's sentences could be legally cumulated in this case, and because these representations were incorrect under section 3.03 of the Texas Penal Code, we conclude that Martinez's pleas were involuntary and must be set aside. *See* TEX. PENAL CODE ANN. § 3.03 (West, Westlaw through Ch. 49, 2017 R.S.). Accordingly, we reverse and remand.

I. BACKGROUND

Several McAllen businesses were burglarized on July 3, 2015, December 31, 2015, January 10, 2016, and February 2, 2016. Investigation revealed that, for each burglary, there was a single forced entry through the rear of a strip mall building, and the perpetrator then broke through sheetrock walls to gain access to the other stores in the building. The various business owners reported a total of over $21,000 in damages. Police identified Martinez as a suspect based on surveillance videos and shoeprint impressions, and he was arrested.

A Hidalgo County grand jury returned six indictments charging Martinez with a total of thirteen counts of burglary of a building, with one count pertaining to each business allegedly victimized. Specifically, Martinez was charged with five counts in trial court

cause number CR-1181-16-I[1]; one count in trial court cause number CR-1443-16-I[2]; two counts in trial court cause number CR-1444-16-I[3]; three counts in trial court cause number CR-1445-16-I[4]; one count in trial court cause number CR-1485-16-I[5]; and one count in trial court cause number CR-1486-16-I.[6]

At an arraignment hearing on May 12, 2016 before the Honorable Aida Salinas Flores, court-appointed defense counsel stated that he had been discussing a possible plea deal with the State. At another hearing on May 17, 2016, before the Honorable Manuel Banales, the prosecutor remarked that Martinez "has thirteen counts of burglary of a building" and "we were going to give him thirteen months to serve in the state jail facility and he was going to sign up, judge, and now, I think he changed his mind." After being admonished by the trial court, Martinez remarked: "I wanted to ask you if I could change attorney. . . . I feel like he's not helping me. I feel like he's attacking me more than helping me. He would—he tells me one thing. He tells my family another." The court denied Martinez's request to appoint another attorney but informed him that he could hire retained counsel if he was able to do so. The case was reset and another hearing was held on May 31, 2016. At this hearing, before the Honorable Romeo Flores, defense counsel asked for another week, stating that Martinez "may be seeking the services of another attorney." The case was reset again for June 16, 2016.

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[1] Appellate cause number 13-16-00456-CR.

[2] Appellate cause number 13-16-00457-CR.

[3] Appellate cause number 13-16-00458-CR.

[4] Appellate cause number 13-16-00459-CR.

[5] Appellate cause number 13-16-00460-CR.

[6] Appellate cause number 13-16-00461-CR.

At the June 16, 2016 hearing, before the Honorable Fidencio Guerra Jr., the following colloquy occurred:

THE COURT: All right. What are you offering?

[Prosecutor]: We're offering 13 months—

THE COURT: Thirteen months?

[Prosecutor]: I actually—I mean we were at 18 months and we came down—

THE COURT: Do you know who I am, [defense counsel]?

[Defense counsel]: Yes, Your Honor. I've explained that to my client, Your Honor.

THE COURT: I don't like burglaries.

[Defense counsel]: Yes, Your Honor.

[Prosecutor]: A lot of damages.

THE COURT: You're going to get time. I would strongly suggest you take her 13 months. I'm serious because—

[Defense counsel]: If I could have an opportunity to talk to my client.

THE COURT: —I'm looking at—if it's 2 to 10, Jesus, how are you giving him 13 months.

[Defense counsel]: It was a state jail felony of a habitation—

THE COURT: A state jail?

[Prosecutor]: Burglaries—

[Defense counsel]: I'm sorry, of buildings, Your Honor.

THE COURT: All of them?

[Defense counsel]: Yes, Your Honor.

[Prosecutor]: Yes, but major businesses here in McAllen, Judge—not in Edinburg but in McAllen.

[Defense counsel]: If I could just—

THE COURT: He's not going to get probation from me. And I guarantee you he would be—if it's a sta[t]e jail he's going to be—

[Prosecutor]: We want more, Judge, than the 13 months. We were just being considerate.

[Defense counsel]: If I could just have an opportunity—

THE COURT: Talk to her and talk to him, you know, but—you know, I'm being fair with you. I would accept—I'll follow her rec because it's not my thing but if you open it up to me, I'm going to max you.

[Defense counsel]: Thank you, Your Honor.

THE COURT: There is just too many—

[Defense counsel]: Yes, Your Honor.

THE COURT: —with the business crimes and stuff. Go ahead and talk to him.

[Defense counsel]: Thank you, Judge.

THE COURT: I don't even know what the facts are.

(Recess.)

THE COURT: Okay. How many is he pleading to?

[Prosecutor]: All of them.

. . . .

THE COURT: Okay. All these five, right?

[Court coordinator]: There should be six, Judge.

THE COURT: Six?

[Court coordinator]: Yes, Judge.

THE COURT: Six?

[Prosecutor]: Yes.

THE COURT: Thirteen months on six never. Two years ain't enough.

[Defense counsel]: It was 13—it was a total of 13 different counts, Your Honor, on five different indictments.

THE COURT: Well, fine, but you tell him he's looking at—if it were to go to me two years on each one stacked.

[Defense counsel]: I've explained that to him, Your Honor, and—

THE COURT: Tell him he's better off coming back Tuesday—

[Defense counsel]: Very well, Your Honor.

THE COURT: —because there will be another Judge but the record will reflect that he's accepting the 13 months.

Are you going to stick with the 13, [prosecutor]?

[Prosecutor]: Yes, Judge, but there is tons of restitution. It's going to be thousands. I didn't offer the 13. My partner did but I respect that, Judge.

THE COURT: All right. That's up to you all. Now, if you come back and change your mind, I don't have a problem with that.

[Prosecutor]: Right, Judge.

THE COURT: You know, if you want to keep that open, then it's open to Judge Salinas or it's open to the Auxiliary Judge.

[Defense counsel]: Thank you, Your Honor.

There was no mention made at this hearing of Martinez's earlier request for additional time to retain counsel.

The initial plea hearing took place on June 21, 2016 before the Honorable Bonner Dorsey. At the beginning of the hearing, the prosecutor noted that the State had offered a plea agreement whereby Martinez would plead guilty and the State would recommend thirteen-month sentences, with the sentences to run concurrently. Judge Dorsey indicated that, although he would accept such an agreement for one of the cause numbers, he would not accept the agreement as to the other cause numbers unless the

sentences were stacked. Defense counsel, after a discussion with Martinez, asked if the judge would accept a plea agreement under which Martinez would serve "maximum probation" following the jail term. The judge indicated that this proposal was not acceptable, and the case was reset again for July 7, 2016.

Finally, on July 7, 2016, before Judge Guerra, Martinez entered his pleas of guilty as to each cause number. Martinez stated that he had received copies of all six indictments and that he was satisfied with the advice and services of his counsel. The trial court admonished Martinez as to the punishment range applicable to state jail felonies. *See id.* § 12.35 (West, Westlaw through Ch. 49, 2017 R.S.). Martinez affirmed that he understood he was waiving his right to trial by jury and to confront witnesses. Defense counsel noted that, although the case was "originally scheduled for a plea bargain," Martinez would be giving an "open plea to the Court." Martinez affirmed that he understood the trial court could order the sentences to run concurrently or consecutively. He entered pleas of guilty to nine counts of burglary of a building.[7] The trial court accepted the pleas and adjudicated Martinez guilty on all nine counts.

The court then heard argument on punishment. The prosecutor noted that Martinez had previously been in state jail for "the same type of offense" and therefore, the offenses could be enhanced to third-degree felonies, but "[w]e chose not to do that" because "[w]e thought we were being reasonable." The prosecutor requested that the

[7] Martinez pleaded guilty to all of the counts charged except Counts II, III, IV, and V in trial court cause number CR-1181-16-I. The trial court stated that those counts would be unadjudicated, but it included restitution for those counts in its sentence under that cause number. *See* TEX. PENAL CODE ANN. § 12.45 (West, Westlaw through Ch. 49, 2017 R.S.) (providing that a defendant may, with consent of the State, admit to one or more unadjudicated offenses; that those offenses may be considered by the court in determining punishment; and that prosecution will then be barred for those offenses).

court impose the maximum penalty for a state jail felony—two years—for each cause number, with the sentences to run consecutively. The following colloquy then occurred:

> [Defense counsel]: [W]e previously had been before Your Honor and there was an agreement previously of 13 months. We had discussed it. You had urged Mr. Martinez to take it.
>
> However, due to the time circumstances, it was very close to lunch time, Your Honor, and there was a lot of paperwork to be signed and it hadn't been signed and so we rescheduled it from Thursday to Tuesday, from 6-16 to 6-21 pending the approval of the judge.
>
> Unfortunately, we didn't have Your Honor before us. We had a different judge who did not accept our plea and therefore, we were scheduled to come back today. We tried to get him the, you know, the increased offer[] of the 24 months.
>
> You know, of course, Mr. Martinez, is very adamant about paying the restitution, Your Honor.
>
> THE COURT: Well, where are you coming at me with these 13 months deal?
>
> [Prosecutor]: Judge, that is not the offer. This defendant, a long time ago, we offered him—
>
> THE COURT: I mean, he looks familiar but I don't remember doing anything on it.
>
> [Prosecutor]: Right. And it was before Your Honor and we ran out of time because there was so much paperwork. The next court setting we placed it in front of that judge and that judge refused to take 13 months. He didn't think it was enough time for all the burglaries. We withdrew that offer.
>
> We've reissued a new offer which is—the other judge was going to stack on all of them, judge. We withdrew the recommendation. Today we offered him two years to run concurrent for a plea deal. He's being difficult. He doesn't want to—he's been difficult this entire time, judge. I think he deserves way more than two years.
>
> THE COURT: How can you not accept two years?

[Defense counsel]: Judge, if I may just continue? This was back on 6-16 when we were before you, Your Honor, and that's when we were going to take the 13 months. There was no restitution or anything to that effect, Your Honor. So he was going to take it but unfortunately and you said you would accept the State's offer 6-16. Unfortunately—

THE COURT: I don't remember saying I was going to accept it—

[Prosecutor]: You didn't say you were going to accept it, Your Honor.

THE COURT: —not on a burglary of a building.

[Defense counsel]: Very well, Your Honor, that was my understanding, Your Honor, and that was my advi[c]e to Mr. Martinez. Then we came back on 6-21 and unfortunately, we still had that 13 month offer. Unfortunately, Judge Bonner did not accept that, Judge Dorsey, if I'm not mistaken.

Unfortunately, he did not accept that so we went back, try to negotiate something and we weren't able to, again, time constraints, and, of course, you know, we're here under, it's past noon already again. So we're here July 7th, Your Honor.

And the reason we're doing an open plea, Your Honor, is because Mr. Martinez is really adamant that he wants, he feels the moral obligation to reimburse the victims for the restitution for the damages that [the prosecutor] had obviously mentioned.

I thinks there's about 25 or $30,000 worth of damage. Certainly, the interest of society, the interest of the victims would be well served if Mr. Martinez were to get some time—some type of probation, Your Honor, so he can have an opportunity.

Maximum probation is what he's asked me to ask of you, Your Honor, so he can have an opportunity to reimburse and make the victims whole. Of course, you know, we were asking for the 13 months in addition to probation, Your Honor. I don't know if that's even possible.

Of course, we're respectfully asking that based on previous discussions and I know Your Honor is

> mentioning that you don't remember and I understand that and if I was mistaken, I sincerely apologize.
>
> But nonetheless, that's what we're asking for, Your Honor, if it's any, at all possible to have some consideration so Mr. Martinez can fulfill his obligation to pay back society and the victims.

The trial court denied Martinez's request for probation and pronounced sentences of two years' state jail on each of the nine burglary charges. The court summarized as follows:

> THE COURT: . . . So he's been given two years state jail on every single count of burglary of a building. No fine in any of these cases. Full restitution in each one of these cases.
>
> CR-1181-16-I, will run concurrent.
>
> CR-1444-16-I, will run concurrent.
>
> CR-1445-16-I, will run concurrent.
>
> CR-1443-16-I, will be stacked.
>
> CR-1485-16-I, will be stacked.
>
> And CR-1486-16-I, will be stacked.
>
> So from the way it looks to me, he's looking at eight years to do in a state jail prison facility. Basically, the ones that have multiple counts, those are all running concurrent. The ones on separate counts, they are the ones that are going to be stacked on top of the others.
>
> So he's looking at, you all clear it up for me, you know, I'm stacking three which would be what? Six? And is that six on top of the two or is that six running with the other two? I got to know if he's going to do six years or he's going to do eight?
>
> [Prosecutor]: That's up to you, judge.
>
> [Prosecutor]: It depends on whether the Court were to stack—you're stacking those which would be six years.

THE COURT: I'm stacking three of them—

[Prosecutor]: Yes.

THE COURT: —which is six years. Now, am I stacking those on the two that are running concurrent?

[Prosecutor]: That's completely up to the Court, judge.

THE COURT: That's what I'm going to do. He'll be doing eight years state jail. Good luck to you, sir.

[Martinez]: Thank you, Your Honor.

THE COURT: Sorry about that. You picked the wrong judge.

Written judgments were signed by the Honorable Jaime Garza on July 11, 2016. In Count I of cause number CR-1181-16-I, Martinez was sentenced to two years in state jail, with the sentence to run consecutive to the sentences imposed in cause numbers CR-1486-16-1, CR-1485-16-1 and CR-1443-16-1, and concurrent with those imposed in cause numbers CR-1444-16-1 and CR-1445-16-1. In cause number CR-1443-16-I, he was sentenced to two years in state jail, with the sentence to run consecutive to those imposed in cause numbers CR-1181-16-1, CR-1485-16-1 and CR-1486-16-1. In Count I of cause number CR-1444-16-1, he was sentenced to two years in state jail, with the sentence to run concurrent with those imposed in cause numbers CR-1445-16-1, CR-1181-16-1, CR-1486-16-1, CR-1485-16-1, and CR-1443-16-1. In Count II of cause number CR-1444-16-1, Martinez was sentenced to two years in state jail with the sentence to "run concurrent unless otherwise specified." In Count I of cause number CR-1445-16-I, Martinez was sentenced to two years in state jail, with the sentence to run concurrent with those imposed in cause numbers CR-1444-16-I, CR-1181-16-1, CR-1486-16-I, CR-1485-16-I, and CR-1443-16-I. In Count II of cause number CR-1445-16-

I, he was sentenced to two years in state jail with the sentence to "run concurrent unless otherwise specified." In Count III of cause number 1445-16-I, he was sentenced to two years in state jail with the sentence to "run concurrent unless otherwise specified." In cause number CR-1485-16-I, he was sentenced to two years in state jail, with the sentence to run consecutive to those imposed in cause numbers CR-1443-16-1, CR-1181-16-1 and CR-1486-16-1. Finally, in cause number CR-1486-16-I, Martinez was sentenced to two years in state jail, with the sentence to run consecutive to those imposed in cause numbers CR-1443-16-1, CR-1181-16-1 and CR-1485-16-1. Together, the judgments ordered Martinez to pay $22,029.61 in restitution.

This appeal followed.

II. DISCUSSION

A. Breach of Plea Agreement

We first address Martinez's three issues contending that the State breached an agreement to recommend a sentence of thirteen months in exchange for Martinez's guilty pleas. Martinez asserts that the State had a "duty" to "recommend the agreement that had been reached" but that the prosecutor "breached that agreement by making comments suggesting she disapproved of the recommendation" and then by making a different recommendation.

Plea agreements are generally considered contractual arrangements between the State and a defendant, but the contractual nature of such an agreement "does not become binding" until the agreement is approved by the trial court. *State v. Moore*, 240 S.W.3d 248, 251 (Tex. Crim. App. 2007). If the court accepts the agreement, the State may not then withdraw its offer. *See Bitterman v. State*, 180 S.W.3d 139, 142 (Tex. Crim. App.

2005) (noting that "a plea agreement is binding upon all parties once the trial judge has accepted it," and "if the prosecution does not perform its responsibilities under the agreement, the plea bargain is considered involuntary"). On the other hand, if the trial court rejects the plea agreement, the defendant must be permitted to withdraw his plea, and the State may withdraw its offer. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (West, Westlaw through Ch. 49, 2017 R.S.); *Moore v. State*, 295 S.W.3d 329, 332 (Tex. Crim. App. 2009).

The record of the trial court proceedings in this case is convoluted, with eight hearings before five different presiding judges and several different prosecutors. Nevertheless, we can locate no point in any of these hearings at which any of the judges unequivocally accepted or approved of any plea agreement calling for the State to recommend a thirteen-month sentence. At the hearing on May 17, 2016, the prosecutor remarked that the State was offering thirteen months but that Martinez did not want to accept the offer, and Martinez asked for more time to retain new counsel. At the June 16, 2016 hearing, the prosecutor again stated that the State was offering thirteen months, and Judge Guerra at one point stated: "I would accept—I'll follow her rec because it's not my thing but if you open it up to me, I'm going to max you."[8] However, after Martinez met with his counsel, the judge remarked that thirteen months would "never" be "enough" for

[8] We note that, although Texas trial judges "are not expressly prohibited by statute or any rule of law from participating in a plea bargaining session," the Texas Court of Criminal Appeals has suggested that "a trial judge should not participate in any plea bargain agreement discussions until an agreement has been reached between the prosecutor and the defendant." *Perkins v. Third Court of Appeals*, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987) (citing *Ex parte Williams*, 704 S.W.2d 773, 777, n.6 (Tex. Crim. App. 1986)). "The reason for this suggestion is that the trial judge should always avoid the appearance of any judicial coercion or prejudgment of the defendant since such influence might affect the voluntariness of the defendant's plea." *Id*. (citing *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983); *Ex parte Shuflin*, 528 S.W.2d 610, 615–17 (Tex. Crim. App. 1975); *Kincaid v. State*, 500 S.W.2d 487, 490–91 (Tex. Crim. App. 1973)).

thirteen counts. The judge later remarked that "the record will reflect that he's accepting the 13 months," thereby indicating that the parties had reached an agreement, but there is no indication that the judge approved of that agreement at that time. At the next hearing on June 21, 2016, Judge Dorsey clearly indicated that he would not accept an agreement for thirteen months unless the sentences were stacked. Finally, at the July 7, 2016 plea hearing, Martinez acknowledged that he was giving open pleas of guilty, that the State was not making a sentencing recommendation, and that the applicable punishment range allowed for sentences of up to two years in state jail. During argument on punishment, the prosecutor indicated that she was no longer offering a recommendation of thirteen months.

Even if we assume that a plea agreement was reached at some point between Martinez and the State, the State was free to withdraw its offer because no judge ever accepted or approved of that agreement. *See Moore*, 295 S.W.3d at 332. We overrule Martinez's issues alleging that the State breached a plea agreement.

B. Cumulation of Sentences and Voluntariness of Pleas

Martinez raises several issues on appeal concerning the trial court's decision to order some of his sentences to be served consecutively. By his first issue,[9] Martinez contends that this decision was improper under section 3.03 of the Texas Penal Code because the offenses were all committed as part of the "same criminal episode" and were prosecuted in a "single criminal action." *See* TEX. PENAL CODE ANN. § 3.03. By three additional issues, Martinez argues that his guilty pleas were involuntary because his trial

[9] Martinez raises this issue only in appellate cause numbers 13-16-00456-CR, 13-16-00457-CR, and 13-16-00460-CR.

counsel "failed to advise [him] and/or the Court that the trial court could not sentence him to consecutive sentences."[10]

Generally, the decision of whether multiple sentences will run consecutively or concurrently is left to the trial court's discretion. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (West, Westlaw through Ch. 49, 2017 R.S.); *Beedy v. State*, 250 S.W.3d 107, 110 (Tex. Crim. App. 2008); *Barrow v. State*, 207 S.W.3d 377, 380 (Tex. Crim. App. 2006). However, section 3.03 of the Texas Penal Code provides that, with certain exceptions not applicable here, sentences must run concurrently "[w]hen the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action." TEX. PENAL CODE ANN. § 3.03. "Criminal episode" means:

> 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, under the following circumstances:
>
> (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

Id. § 3.01 (West, Westlaw through Ch. 49, 2017 R.S.). The Texas Court of Criminal Appeals has held that a defendant is prosecuted in "a single criminal action" whenever "allegations and evidence of more than one offense arising out of the same criminal episode, as that term is defined in Chapter 3, are presented in a single trial or plea

[10] Martinez also contends that his plea was involuntary because his trial counsel "assured [him] that he would receive thirteen months if he pled open to the court." The record, however, establishes that Martinez entered open pleas of guilty after being admonished of the punishment range applicable to a state jail felony and without any punishment recommendation made by the State. Martinez stated affirmatively at the plea hearing that he was not promised anything in return for his guilty pleas. He directs us to no point in the record indicating that he was assured, by his counsel or by anyone else, that he would receive a thirteen-month sentence if he pleaded guilty.

proceeding, whether pursuant to one charging instrument or several." *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992).

Martinez argues that the nine offenses to which he pleaded guilty, though committed over the course of eight months in 2015 and 2016, constitute a "single criminal episode" under the very broad statutory definition. He further argues that, because all nine guilty pleas were heard at the same proceeding, they are part of a "single criminal action" and therefore the trial court was not permitted to stack the sentences.[11]

The State concedes the point and acknowledges that Martinez's offenses were each committed as part of the "same criminal episode" and were prosecuted in a "single criminal action." The State asks us to modify the judgments to delete the provisions ordering the sentences to be served consecutively. *See Jackson v. State*, 157 S.W.3d 514, 515–16 (Tex. App.—Texarkana 2005, no pet.) (modifying judgment to delete improper cumulation order); *Guidry v. State*, 909 S.W.2d 584, 585 (Tex. App.—Corpus Christi 1995, pet. ref'd) (same). However, the situation in this case is more complicated. Throughout the various hearings in the trial court, all parties, including the trial court judges, appeared to be under the false impression that the stacking of sentences would be within the trial court's discretion, whether or not there was a plea agreement. Martinez's pleas of guilty were given with this potential outcome in mind. Moreover, crucially, Martinez's decision to plead guilty was taken while he was under the false impression that, were he to plead not guilty and be convicted at trial, cumulation of

[11] Though Martinez's trial counsel did not object to the stacking order, he was under no obligation to do so in order to preserve the issue for appellate review. *See Mizell v. State*, 119 S.W.3d 804, 806 n.6, n.7 (Tex. Crim. App. 2003) (noting that sentences not authorized by law are void and illegal, and unlike most trial errors which are forfeited if not timely asserted, a party is not required to make a contemporaneous objection to the imposition of an illegal sentence).

sentences would be a lawful option for the trial court.

To be statutorily and constitutionally valid, a guilty plea must be free and voluntary. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13 (West, Westlaw through Ch. 49, 2017 R.S.) ("No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary."); *Bousley v. United States*, 523 U.S. 614, 618 (1998) ("A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'"). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Brady*, 397 U.S. 742, 748 (1970). An involuntary guilty plea must be set aside. *Fimberg v. State*, 922 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (citing *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975)).

An accused who attests that he understands the nature of his plea when entering a plea of guilty and that it is voluntary, as in this case, has a heavy burden on appeal to show that his plea was involuntary. *See Fielding v. State*, 266 S.W.3d 627, 636 (Tex. App.—El Paso 2008, pet. ref'd); *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). But a plea based on erroneous information conveyed to the defendant is involuntary. *See Ex parte Barnaby*, 475 S.W.3d 316, 322 n.8 (Tex. Crim. App. 2015) (per curiam) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding plea to be involuntary where counsel failed to advise the defendant about immigration consequences); *Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012) (same where defense counsel misinformed appellant regarding parole eligibility); *Ex parte*

Griffin, 679 S.W.2d 15, 18 (Tex. Crim. App. 1984) (same where defense counsel erroneously told the defendant that his plea agreement included the disposition of an earlier criminal case)). The Texas Court of Criminal Appeals has recently stated:

> Misrepresentations that may cause a plea to be involuntary can come from a variety of sources. While many claims allege erroneous advice or misinformation by defense counsel, misrepresentations can also come from the trial court, or the state. Misrepresentation can be even more fundamental: a plea would be involuntary if a defendant is in total ignorance of the precise nature of the charge and the range of punishment it carries. Such a defendant has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this sense.

Id. at 322 (footnotes and internal quotations omitted).

The voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it." *Id*. (citing *Brady*, 397 U.S. at 749). In considering the voluntariness of a guilty plea, the record should be examined as a whole. *Id*. (citing *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998)).

Considering the entire record and all the relevant circumstances, we find that Martinez's pleas were involuntary because they were based, at least in part, on the misconception that the trial court could validly order his sentences to run consecutively. *See Moussazadeh*, 361 S.W.3d at 691 ("When deciding whether to accept or reject a plea offer, a defendant will likely consider the actual minimum amount of time he will spend incarcerated."). We therefore sustain Martinez's issues asserting that his pleas were involuntarily given and we set aside those pleas. See TEX. CODE CRIM. PROC. ANN. art. 26.13; *Bousley*, 523 U.S. at 618.[12]

[12] Martinez also raises four issues arguing that his trial counsel provided ineffective assistance. In light of our conclusion that the guilty pleas must be vacated, we need not address these issues because,

III. CONCLUSION

We reverse the trial court's judgments and remand for further proceedings consistent with this opinion.

DORI CONTRERAS
Justice

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

Delivered and filed the
27th day of July, 2017.

even if sustained, they would not afford Martinez any greater relief. *See* TEX. R. APP. P. 47.1; *Gonzalez Soto v. State*, 267 S.W.3d 327, 334 n.29 (Tex. App.—Corpus Christi 2008, no pet.).