

**Affirmed as Modified and Opinion filed January 18, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-01312-CR**  
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**ROBERTO GONZALES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 177th District Court  
Harris County, Texas  
Trial Court Cause No. 806,165**

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**OPINION**

Appellant was convicted by a jury of burglary of a habitation. *See* TEX. PENAL CODE §30.02(a). Along with its finding of guilt, the jury made a deadly weapon finding and assessed punishment at life in the Institutional Division of TDCJ. The trial court then granted the State's Motion to Cumulate Sentence and stacked the life sentence assessed in this case on a life sentence imposed on appellant in a previous cause number. Challenging the judgment and cumulation order, appellant raises two issues for review. Reforming the judgment of the trial court as to the cumulation order, we will affirm.

**Background**

During the punishment phase of appellant's burglary trial, the defense refused to stipulate to any judgments and sentences for appellant's previous convictions. As a result of this refusal, the State called Roy McDonald, a fingerprint examiner from the Harris County Sheriff's Office, who had earlier taken a fingerprint from the appellant. McDonald testified that he had compared that fingerprint to prints contained in three other jail cards belonging to the Sheriff's department and determined them to be a match. The State then called Judith Porter, a records custodian from the inmate section of the Sheriff's Department. After authenticating the jail cards testified to by McDonald, Porter testified as to the offenses listed on each card: burglary of a motor vehicle in cause number 9632153, unauthorized use of a motor vehicle in cause number 706903, and felon in possession of a weapon in cause number 806163. At the close of punishment phase testimony, the jury assessed appellant's sentence in the instant cause at life imprisonment.

With the jury excused, the court then heard the State's motion to cumulate. At this point, the State asked that the court take judicial notice of appellant's previous conviction, out of the same court, for murder in cause number 777715. Granting the State's motion, the court ordered that appellant's life sentence in the present cause run concurrent with his prior life sentence assessed in cause number 777715. Appealing this order, appellant now presents two issues for review.

### **Issues One and Two**

In two related points of error, appellant argues that the trial court's cumulation order was erroneous. First, appellant posits that the trial court failed to find that he was the defendant in cause number 777715. Second, appellant argues that even had the court made such a finding, the evidence adduced at trial left the court without a factual basis for concluding that appellant was the defendant in that case.

Before turning to appellant's two issues, however, we first address the State's claim that appellant failed to preserve anything for review. We disagree. An improper cumulation order is, in essence, a void sentence, and such error cannot be waived. *Laporte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). Moreover, an appellant may raise, at any time, a defect rendering a sentence void. *Id.* Consequently, the Court of Criminal Appeals has held that a contemporaneous objection is not necessary to preserve such error for appellate review. *See id.*

Having found that appellant did not waive his cumulation issues, we now address them simultaneously. Whether a sentence is to run concurrently or consecutively is within the discretion of the court. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 2000). In order to support a motion for consecutive sentencing, the State must present record evidence of prior convictions and testimony identifying the defendant as the person previously convicted. *See Turner v. State*, 733 S.W.2d 218, 223 (Tex. Crim. App. 1987). However, an admission by the defendant or his counsel is sufficient evidence to link him to his prior convictions. *Id* at 221. *Miller v. State*, No. 1692-99, slip op. at 10-11, 2000 WL 1676679, at \*4 (Tex. Crim. App. Nov 8, 2000). Additionally, a trial court may take judicial notice of all its own records, including all judgments and convictions entered by it. *See Turner* at 221-22. Finally, we review appellant's complaint of improper cumulation of sentences under an abuse of discretion standard. *See Allen v. State*, 951 S.W.2d 925, 925 (Tex. App.—San Antonio 1997, pet. ref'd). A trial court abuses its discretion when it applies an erroneous legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and facts viewed in the light most favorable to its legal conclusion. *See Dubose v. State*, 915 S.W.2d 493, 497-98 (Tex. Crim. App. 1996).

In the case at bar, the record shows that the State's motion to cumulate referenced appellant's name, conviction, and sentence in cause number 777715. Granting the State's motion, the court then entered a finding that "the defendant, in cause number 777715 in the 177<sup>th</sup> District Court of Harris County, Texas, was sentenced to a term of life in the Institutional Division of the Texas Department of Criminal Justice." Assuming that this finding constitutes evidence of appellant's prior conviction, the record is nevertheless absent any testimony identifying the appellant as the person convicted of the offense. Neither does the State point to any portion of the record evidencing such testimony. The testimony given by McDonald and Porter, concerning appellant's prior offenses, likewise fails to implicate appellant as the defendant in cause number 777715. Therefore, because the record is absent any proof identifying the defendant as the person previously convicted in cause number 777715, the trial court abused its discretion in granting the State's motion to cumulate. We sustain appellant's two issues and set aside the trial court's order cumulating appellant's sentence in this cause with that sentence in cause number 777715. As

reformed, the judgment of the trial court is affirmed.

/s/ Maurice Amidei  
Justice

Judgment rendered and Opinion filed January 18, 2001.

Panel consists of Chief Justice Murphy and Justices Hudson and Amidei.<sup>1</sup>

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<sup>1</sup> Former Justice Maurice Amidei sitting by assignment.