AFFIRMED as MODIFIED and Opinion Filed July 13, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00699-CR
No. 05-19-00824-CR

JOSHUA LEWIS NEAL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 6
Dallas County, Texas
Trial Court Cause Nos. F16-57003-X, F18-52038-X

MEMORANDUM OPINION
Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

In 2016, appellant was charged with aggravated robbery, a first-degree felony.[1] The State and appellant entered into a plea bargain agreement where the State reduced the offense to robbery, a second-degree felony, and struck the enhancement paragraph in the indictment. In exchange, appellant entered a plea of

[1] Cause No. F16-57003-X/05-19-00699-CR.

guilty and judicially confessed to the offense. In keeping with that agreement, the trial court sentenced appellant to five years' deferred unadjudicated community supervision and a fine of $2000.

In 2018, appellant was charged with unlawful possession of a firearm by a felon, a third-degree felony.[2] The indictment included an enhancement paragraph. As part of a plea bargain agreement with the State, appellant entered a plea of guilty, judicially confessed to the offense, and entered a plea of true to the enhancement paragraph, which raised the range of punishment to that of a second degree felony. *See* TEX. PENAL CODE ANN. §§ 12.33(a), 12.42(a). In keeping with that agreement, the trial court sentenced appellant to three years' deferred unadjudicated community supervision.

The State subsequently filed motions to revoke community supervision and proceed with adjudication of guilt in both cases. At a hearing on those motions, appellant entered pleas of true to some of the State's allegations and not true to other allegations. The State presented evidence of a new offense, *i.e.*, an assault against appellant's girlfriend. The trial court found the State's allegations true and sentenced appellant to twenty years' imprisonment in each case. The trial court further ordered that the sentences run consecutively.

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[2] Cause No. F18-52038-X/05-19-00824-CR.

Appellant raises three issues on appeal. First, appellant claims that the sentences assessed constitute cruel and unusual punishment under both the Eighth Amendment of the federal constitution and Art. I, Section 13 of the Texas Constitution. *See* U.S. CONST. amend. XIII; TEX. CONST. Art. I § 13. Second, appellant claims that the trial court abused its discretion by sentencing him to maximum terms of imprisonment in violation of the objectives of rehabilitation found in PENAL § 1.02(1)(B), (3). Third, appellant claims that the trial court erred by assessing duplicative court costs. In a cross-point, the State asks that we modify the judgment in F16-57003-X to correctly reflect that the trial court ordered the sentences in both cases to run consecutively.

Cruel and Unusual Punishment

In his first issue, appellant claims that the sentences assessed in both cases constitute cruel and unusual punishment under both the federal and Texas constitutions. The State responds that appellant has not preserved this complaint for appellate review or, in the alternative, that the sentences assessed were appropriate. We agree with the State.

Preservation

To preserve error, a defendant must make a timely request, objection, or motion in the trial court. *See* TEX. R. APP. P. 33.1(a)(1); *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). Constitutional rights, including

the right to be free from cruel and unusual punishment, may be waived by a failure to raise those issues in the trial court. *Castaneda*, 135 S.W.3d at 723. Here, at the time the trial court pronounced appellant's sentences, appellant did not object to those sentences on any grounds, much less that those sentences violated his constitutional rights.

While recognizing the rules on preservation, appellant claims that a specific objection was not necessary in these cases because defense counsel requested that appellant receive a sentence of two to three years for his robbery conviction and that he be continued on community supervision for 10 years on the unlawful possession of a firearm by a felon case. As appellant states in his brief to this Court, "[t]hese requests alleviate the need for a specific objection and preserves the issue for appellate review." We do not agree.

We recognize that appellant filed a motion for new trial in Cause No. F16-57003-X. The motion was based on allegations that "the verdict is contrary to the law and the evidence." As this Court has held, a motion for new trial that generally complains the verdict is contrary to the law and the evidence does not preserve a complaint that punishment was excessive. *Garza v. State*, No. 05-11-01626-CR, 2013 WL 1683612, at *2 (Tex. App.—Dallas Apr. 18, 2013, no pet.) (mem. op., not designated for publication). And no motion for new trial was filed in Cause No. F18-52038-X.

Because appellant failed to object at the time the trial court pronounced his sentences, and because he did not raise the issue of excessive sentencing in a post-conviction motion for new trial, appellant has not preserved this issue for appellate review.

The Sentences are Not Excessive or Constitutionally Disproportionate

Even if appellant had preserved this issue for review, this Court could not find that the sentences assessed were excessive or constitutionally disproportionate to the offenses for which appellant was convicted.

The concept of proportionality in sentencing is embodied in the Eighth Amendment's prohibition of cruel and unusual punishment. U.S. CONST. amend. VIII, XIV; *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016); *see also* TEX. CONST. art. I §13. This is a narrow principle that does not require strict proportionality between the crime and the sentence imposed. *Simpson*, 488 S.W.3d at 322 (*citing Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J. concurring)). Rather, it forbids only those rare and extreme sentences that are so "grossly disproportionate" to the crime as to amount to cruel and unusual punishment. *Id*. (*citing Ewing v. California*, 538 U.S. 11, 23 (2003)). Generally, punishment assessed within the statutory limits is not considered excessive, cruel, or unusual. *Id*. at 323; *see also Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984) (stating it is "the general rule that as long as a sentence is within the proper

range of punishment it will not be disturbed on appeal"); *Foster v. State*, 525 S.W.3d 898, 911 (Tex. App.—Dallas 2017, pet. ref'd); *Castaneda*, 135 S.W.3d at 723.

To determine whether a sentence for a term of years is grossly disproportionate for a particular crime, this Court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses. *Simpson*, 488 S.W.3d at 322 (*citing to Graham v. Florida*, 560 U.S. 48, 60 (2010)). In the rare case in which this threshold comparison leads to an inference of gross disproportionality, this Court then compares the sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Id*. (*citing to Graham*, 560 U.S. at 60). It is only when this comparative analysis validates an initial judgment that the sentence is grossly disproportionate that the sentence is deemed cruel and unusual. *Id*.

The robbery offense of which appellant was convicted is a second degree felony. PENAL § 29.02(b). While unlawful possession of a firearm by a felon is a third-degree felony, because appellant entered a plea of true to the enhancement paragraph alleged in that offense, the available range of punishment was elevated to a second degree felony. PENAL §§ 12.42(a), 46.04 (a), (e). A second degree felony carries a punishment range of not more than twenty years or less than two, and a fine not to exceed $10,000. PENAL §§ 12.33(a). As appellant concedes in his brief to this

Court, the trial court assessed punishment within that range, albeit the maximum possible term of years. Because the punishment assessed was within the statutory range, it is not excessive or unconstitutionally cruel and unusual.

Further, the record in this case does not lead to an inference of gross disproportionality because the facts of this case do not present a rare or extreme case. Appellant's culpability for these felonies was established by his guilty pleas and judicial confessions to these offenses. He had originally been placed on deferred unadjudicated community supervision in both cases and was found to be in violation of that community supervision. While on community supervision, appellant was accused of yet a third felony, *i.e.*, assaulting his girlfriend.

At the hearing on the State's motions to adjudicate guilt, evidence was introduced regarding this assault and appellant's later efforts to have his girlfriend drop the charges against him. Appellant's girlfriend testified that appellant assaulted her and also to the injuries, pain, and continued after-effects she suffered as a result of that assault. A responding officer who interviewed this woman in the hospital testified as to the injuries he observed and her emotional state; photographs of her injuries were also introduced into evidence. Evidence was heard that, prior to the hearing on the State's motions to adjudicate guilt, appellant made multiple attempts to have his girlfriend drop the charges against him. The trial court also heard evidence that appellant had a prior conviction for assault/family violence and an

extensive criminal history. No significant mitigating evidence was introduced which could have supported an argument that a lesser sentence was constitutionally mandated. Because the sentences are supported by the evidence, this is not a rare or extreme case where it can be held that the sentences are grossly disproportionate to the offenses. We overrule appellant's first issue.

Penal Code Objectives

In his second issue, appellant claims that the trial court abused its discretion by sentencing him to maximum terms of imprisonment in violation of the objectives of rehabilitation found in PENAL § 1.02(1)(B), (3).[3] The State responds that appellant has not preserved this complaint for appellate review and, even if he did, his issue is without merit. We agree with the State.

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[3] TEX. PENAL CODE ANN. § 1.02 provides, in relevant part, as follows:

> The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:
>
> (1) to insure the public safety through:
>
> *
>
> (B) the rehabilitation of those convicted of violations of this code; and
>
> *
>
> (3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders.

As noted above, to preserve alleged error relating to excessive punishment, a defendant must make a timely request, objection, or motion to the trial court. TEX. R. APP. P. 33.1(a)(1)(A); *Castaneda*, 135 S.W.3d at 723. Because appellant did not complain about his sentences, either at the time they were imposed or in a post-trial motion for new trial, he has failed to preserve any error for our review. *Castaneda*, 135 S.W.3d at 723; *see also Littlebird v. State*, No. 05-17-00709-CR, 2018 WL 2926811, at *2 (Tex. App.—Dallas June 7, 2018, no pet.) (mem, op., not designated for publication) (finding that a defendant failed to preserve a claim that he was sentenced in violation of the rehabilitative objectives of the Texas Penal Code because he did not complain about the sentences at the time punishment was imposed, and, in a motion for new trial, he did not specifically complain about the length of the sentences); *Thornton v. State*, 05-16-00565-CR, 2017 WL 1908629, at *4 (Tex. App.—Dallas May 9, 2017, pet. ref'd) (mem. op., not designated for publication) (same).

Even if appellant had preserved his complaint for our review, we would resolve it against him. In addition to the objective of rehabilitation, the penal code has the stated objectives of deterrence and punishment as necessary to prevent likely recurrence of criminal behavior. *See* PENAL § 1.02(1)(A), (C). A trial court has a great deal of discretion to determine the appropriate punishment in any given case. *Foster,* 525 S.W.3d at 911 (citing *Jackson*, 680 S.W.2d at 814). As with issues

involving claims of excessive or disproportionate sentencing, as long as the sentence is within the proper range of punishment, it will not generally be disturbed on appeal. *Id*.

Appellant originally pled guilty to both offenses. He acquired an assault charge while on community supervision for those offenses and extensive testimony was heard concerning the facts of that offense. The trial court also had evidence of appellant's extensive criminal history. And appellant's twenty year sentences are within the statutory range for the offense, which is two to twenty years' imprisonment. Based on appellant's criminal history and the nature of the offenses, we cannot conclude that appellant's sentences violated the objectives of the penal code. We overrule appellant's second issue.

Court Costs

In his third issue, appellant claims that the trial court erred by assessing duplicative court costs. Specifically, appellant claims that because these two cases were "consolidated for the revocation hearing," this is now one criminal action and only one set of court cost fees should be assessed. He relies on TEX. CODE CRIM. PROC. ANN. art. 102.073(a) (providing that, in a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant). The State responds that appellant has forfeited this complaint because he did not

challenge the court costs at the time they were assessed, *i.e.*, when he was placed on deferred adjudication community supervision.

The records in these cases reflect that the court costs were assessed not in a single proceeding, but at two different times in two separate proceedings. In Cause No. F16-57008-X, at the time appellant was placed on deferred unadjudicated community supervision, *i.e.*, on November 18, 2016, the trial court assessed $224 in court costs. No court costs are listed in the judgment adjudicating guilt, which was entered on April 25, 2019. In Cause No. F18-52038-X, at the time appellant was placed on deferred unadjudicated community supervision, *i.e.*, on April 13, 2018, the trial court assessed $249 in court costs. No court costs are listed in the judgment adjudicating guilt, which was entered on April 25, 2019.

As part of his plea bargain in both cases, appellant waived his right of appeal at the time he was placed on deferred unadjudicated community supervision. The trial court certified, in both cases, that appellant had no right of appeal. In Cause No. F18-52038-X, the trial court further certified that appellant had waived his right of appeal.[4]

A defendant who has pleaded guilty and been placed on deferred unadjudicated community supervision may raise issues relating to the original plea

[4] The certificate of appellant's right to appeal in Cause No, F16-57008-X is silent as to appellant's right to appeal.

proceeding only in appeals taken when deferred adjudication community supervision is first imposed. *Perez v. State*, 424 S.W.3d 81, 85–86 (Tex. Crim. App. 2014) (holding that a defendant's waiver of his right to appeal does not excuse his failure to appeal the assessment of court costs at the time of the original imposition of community supervision.); *Martinez v. State*, No. 05-13-01281-CR, 2014 WL 5804119, at *4 (Tex. App.—Dallas Nov. 10, 2014, no pet.) (mem. op., not designated for publication) (holding that, because court costs were imposed when the defendant was originally placed on community supervision, and nothing in the record showed that additional costs were assessed when he was adjudicated guilty, any complaint about the court costs after adjudication was untimely); *Celestine v. State*, No. 05-12-01677-CR, 2014 WL 1022423, at *4 (Tex. App.—Dallas Feb. 24, 2014, no pet.) (mem. op., not designated for publication) (holding that because the defendant did not appeal the imposition of court costs when the deferred adjudication order was rendered, his complaints about those costs are untimely). Appellant may not now challenge the imposition of those costs. We overrule appellant's third issue.

Modification of Judgment

In a cross-point, the State asks that this Court modify the judgment in Cause No. F18-52038-X to reflect that the trial court ordered the sentences to run consecutively and not, as the judgment states, concurrently.

Here, the appellate record reflects that, in sentencing appellant, the trial court made the following statement:

> And in both cases I will now set your punishment at 20 years' confinement in the penitentiary.
>
> And pursuant to Section 42.08 of the Code of Criminal Procedure, the judgment and sentence in the robbery case will begin after the judgment and sentence in the UPF felon case has been discharged and ceased to operate. In the other words, I have stacked those sentences. That concludes this hearing.

The judgment in Cause No. F16-57008-X, the robbery case, correctly states as follows: "THIS SENTENCE SHALL RUN: CONSECUTIVELY." The judgment in the unlawful possession of a firearm by a felon case, Cause No. F18-52038-X, however, states as follows: "THIS SENTENCE SHALL RUN: CONCURRENTLY."

We have the authority to modify an incorrect judgment when the evidence necessary to correct that judgment appears in the record. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the trial court's judgment adjudicating guilt in Cause No. F18-52038-X to read "CONSECUTIVELY" in the in the "This Sentence Shall Run" field of the judgment.

Conclusion

As modified, we affirm the trial court's judgment.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA LEWIS NEAL, Appellant	On Appeal from the Criminal District Court No. 6, Dallas County, Texas
No. 05-19-00699-CR V.	Trial Court Cause No. F-1657003-X.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Osborne. Justices Whitehill and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 13, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA LEWIS NEAL, Appellant	On Appeal from the Criminal District Court No. 6, Dallas County, Texas
No. 05-19-00824-CR V.	Trial Court Cause No. F18-52038-X. Opinion delivered by Justice
THE STATE OF TEXAS, Appellee	Osborne. Justices Whitehill and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REFORMED AND AFFIRMED**.

Judgment entered July 13, 2020