IN THE COURT OF APPEALS OF IOWA

No. 2-1076 / 10-0299
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAULINO PEREZ MONDRAGON,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

Defendant appeals his convictions for first-degree robbery and assault while participating in a felony, and his sentence on the robbery charge. **AFFIRMED.**

Benjamin D. Bergmann of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Allen Cook III, County Attorney, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Paulino Perez-Mondragon appeals his convictions for first-degree robbery, in violation of Iowa Code section 711.2 (2007), and assault while participating in a felony, in violation of section 708.3, and his sentence on the robbery charge. He claims the district court should have granted his motion to suppress statements he made to police officers. We affirm defendant's convictions, finding there was harmless error. We also affirm his sentence on the robbery charge.

I. Background Facts & Proceedings

In the evening on February 28, 2008, Juana Zavala was working at Corazon Latino, a store which was located at 412 East Main Street in Ottumwa, Iowa.[1] A man came in wearing dark clothing and a ski mask. The man put a knife to her throat and threatened to kill her. He took her to the back of the store and tied her hands. After the man left, Zavala managed to call the police. Jewelry and about $3000 had been taken from the store.

It had snowed that evening, and police officers saw footprints in the snow which indicated two people had been running away from Corazon Latino. The officers followed the footprints to 602 East Main Street, about two blocks away. Andrea Barton was standing outside the door, and she stated her two roommates, Perez-Mondragon and Leonardo Rufin-Fones, had just arrived home. Barton consented to let the officers into the home. She informed the officers that her roommates spoke little English. In a common living area officers found a pair of wet shoes with a tread that matched one set of footprints leading

[1] Zavala died before the trial in this case, and the parties agreed her testimony could be presented through her deposition.

away from the store. Perez-Mondragon acknowledged they were his shoes. In the bathroom, officers found two ski masks.

The officers asked Perez-Mondragon to accompany them to the police station. He was taken to an interview room at about midnight and left on his own for about an hour while officers attempted to get a Spanish-speaking interpreter. The officers told him he was free to leave at any time. During this time Perez-Mondragon apparently took a short nap, manicured his fingernails, played with a deck of cards, and chewed gum while waiting in the room.

When the interpreter arrived at about 1:00 a.m., Officer Mark Milligan read the defendant his Miranda rights in English while the interpreter told them to him in Spanish. In addition the defendant was given a card to read which had the Miranda rights in English and Spanish. Officer Milligan then asked Perez-Mondragon, "Do you understand?" The defendant replied, "Yes but . . . what is it about?" The officer asked again, "Does he understand his rights?" and the defendant nodded his head. The officer asked a third time, "But he does understand his rights, right?" and the defendant replied, "Well yes . . . but . . . I mean I do not understand what it is what you want to investigate . . . what about." The defendant was then asked if he knew why he was there, and he stated "No."

About one hour into the interview, Sergeant Nick Wadding joined officer Milligan in questioning Perez-Mondragon. The officers told defendant that Rufin-Fones had confessed to the robbery and implicated him, which was not a truthful statement. The defendant continued to deny any involvement in the robbery. Eventually, the defendant asked for a minute alone to think, and when the

officers returned he stated he and Rufin-Fones had entered the store wearing ski masks and holding knives, but he denied threatening the victim or taking anything from the store. Perez-Mondragon was arrested at the end of the interview, which had lasted about two hours.

While the defendant was being interviewed at the police station, other officers executed a search warrant at his apartment. They seized the two ski masks, as well as two pairs of shoes. Officers found jewelry and cash under a mattress, and two knives.

Perez-Mondragon was charged with first-degree robbery and assault while participating in a felony.[2] He filed a motion to suppress. After a hearing, the district court denied the motion. The court found Barton had authority to consent to a search of the common areas of the apartment, including the room where Perez-Mondragon's shoes were found. The court also found officers had sufficient probable cause to request a search warrant. Additionally, the court denied the defendant's request to suppress his statement admitting that the shoes found belonged to him.

The defendant, with new defense counsel, filed a second motion to suppress, which was also denied by the district court.[3] The court found Perez-Mondragon was in custody at the time of the police interview, he was informed of his Miranda rights, and he acknowledged understanding those rights. The court

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[2] Rufin-Fones was charged in the same trial information. His criminal charges were subsequently severed from those against Perez-Mondragon.

[3] After the defendant's first motion to suppress was denied, he entered a guilty plea to first-degree robbery. He then obtained a new attorney and filed a motion in arrest of judgment. The district court granted the motion in arrest of judgment, finding there had been translation problems at the guilty plea proceedings.

found the conditions of the interview did not make defendant's statements involuntary. The court determined defendant's statements had not been coerced by promises of leniency.

The case proceeded to trial. Perez-Mondragon was convicted of first-degree robbery and assault while participating in a felony. He was sentenced to a term of imprisonment not to exceed twenty-five years on the robbery charge, and required to serve a minimum of seventy percent of that time before he would be eligible for parole. He was also sentenced to a term of five years on the assault charge, to be served concurrently with the robbery sentence. Perez-Mondragon appeals.

II. Harmless Error.

We do not address issues raised by Perez-Mondragon concerning whether he was in custody at the time he was questioned by officers, whether he was adequately informed of his Miranda rights and understood those rights, whether his statements to officers were voluntary, or whether officers made improper promises of leniency, but turn first to the issue of whether there was overwhelming evidence of his guilt. *See State v. Howard*, ___ N.W.2d ___, ___ 2012 WL 6662639 (Iowa 2012) ("Even under a constitutional analysis, it is possible for the erroneous admission of a confession to be harmless error on a particular record.").

The State contends that Perez-Mondragon's conviction should be affirmed even if his confession should have been suppressed because any error was

harmless in light of the overwhelming evidence of the defendant's guilt. We agree. As observed by our supreme court in *Howard*, ___ N.W.2d at ___:

> "'Error . . . predicated upon a ruling which admits or excludes evidence' will not provide a defendant with a basis for relief on appeal, 'unless a substantial right of the [defendant has been] affected.'" *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008) (quoting Iowa R. Evid. 5.103(a)). We presume the defendant's rights have been prejudiced unless the State can affirmatively establish otherwise. *Id.* The State overcomes the presumption of prejudice if it can establish that there was overwhelming evidence of the defendant's guilt. *See id.* at 210; *see also State v. Ware*, 205 N.W.2d 700, 705 (Iowa 1973) (applying the overwhelming evidence standard in assessing whether the district court's error in admitting defendant's involuntary confession was harmless error).

Here, Perez-Mondragon testified at this trial and admitted elements establishing robbery in the second degree. However, he denied possessing or displaying a knife or committing an assault. Robbery in the first degree is robbery that while perpetrated, the defendant "purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." Iowa Code § 711.2. The victim, Juana Zavala, testified that the man who took her to the back of the restaurant had a knife with a wide blade. She also testified that he put the knife against her body and said to walk or he would kill her. It is also significant that Perez-Mondragon and Rufin-Fones were located quickly after the commission of the offense by their footprints in the fresh snow. A subsequent search of the residence found two knifes hidden, one of which had a wide blade, along with the money and jewelry stolen from the restaurant. In view of this overwhelming evidence, Perez-Mondragon's conviction should be affirmed even if his confession should have been suppressed.

III. Sentence

The Eighth Amendment of the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." A sentence may be considered to be cruel and unusual if it is "grossly disproportionate" to the severity of the crime. *Rummel v. Estelle*, 445 U.S. 263, 271 (1980). Our review of constitutional claims is de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

Perez-Mondragon contends his sentence for first-degree robbery is unconstitutional under the Eighth Amendment because it constitutes cruel and unusual punishment.[4] He claims his sentence was grossly disproportionate to the offense. He makes an as-applied challenge, which we take to be a challenge to his particular sentence. *See State v. Oliver*, 812 N.W.2d 636, 639-40 (Iowa 2012) (noting the terms "facial challenge" and "as-applied challenge" are no longer used). We will review defendant's claim as making a gross proportionality challenge to his particular sentence. *See id.* at 640 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010)).

The United States Supreme Court set forth a test for considering a proportionality claim under the Eighth Amendment in *Solem v. Helm*, 463 U.S. 277, 292 (1983), with the following criteria: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. This three-step analysis should be used for

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[4] Perez-Mondragon does not make a separate claim under the cruel and unusual punishment provision in the Iowa Constitution. *See* Iowa Const. art. I, § 17.

considering a gross proportionality challenge to a particular defendant's sentence. *Id.* at 648. This test is based on the specific facts of the case. *Bruegger*, 773 N.W.2d at 884.

We first consider whether a defendant's sentence leads to an inference of gross disproportionality to the crime. *Oliver*, 812 N.W.2d at 650. "The preliminary test involves a balancing of the gravity of the crime against the severity of the sentence." *Bruegger*, 773 N.W.2d at 873. Some principles we consider in determining whether a defendant's sentence is grossly disproportionate are: (1) the legislature is entitled to substantial deference in setting penalties; (2) rarely will a sentence be so grossly disproportionate as to satisfy the threshold inquiry; (3) a longer sentence for recidivist offenders is permissible; and (4) a sentence may become grossly disproportionate based on the unique features of a case. *Oliver*, 812 N.W.2d at 650-51.

"If the sentence does not create an inference of gross disproportionality, then 'no further analysis is necessary.'" *Id.* at 650 (citation omitted). It is a "'rare case when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality.'" *State v. Lara*, 580 N.W.2d 783, 785 (Iowa 1998) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring in part)). "Only extreme sentences that are 'grossly disproportionate' to the crime can conceivably violate the Eighth Amendment." *Id*.

Robbery in the first degree is a class "B" felony. Iowa Code § 711.2. The maximum sentence for a class "B" felony is confinement for no more than twenty-

five years. *Id.* § 902.9(2). Furthermore, a person convicted of first-degree robbery must serve at least seven-tenths of the maximum term of that sentence. *Id.* § 902.12(5). Thus, a person convicted of first-degree robbery must serve seventeen and one-half years before being eligible for parole.

The Iowa Supreme Court has already considered in *Lara*, 580 N.W.2d at 785-86, whether the punishment for first-degree robbery is grossly disproportionate to the crime. At that time, the sentence for first-degree robbery was also twenty-five years, but the mandatory minimum was eighty-five percent of that sentence.[5] *Lara*, 580 N.W.2d at 785. The court found, "The risk of death or serious injury to persons present when first-degree robbery is committed is high. A twenty-five year prison sentence with a requirement that the inmate serve at least eighty-five percent of the sentence does not lead to an inference of gross disproportionality." *Id.*; *see also State v. Ramirez*, 597 N.W.2d 795, 798 (Iowa 1999), *overruled on other grounds by Bruegger*, 773 N.W.2d at 871, (finding defendant's sentence for first-degree robbery did not constitute cruel and unusual punishment).

We conclude Perez-Mondragon's sentence for first-degree robbery is not grossly disproportional to the severity of the offense. An employee of the store that was robbed was held at knife point and her life was threatened. As the Iowa Supreme Court has noted, there is a high risk of death or serious injury to persons present when first-degree robbery is committed. *Lara*, 580 N.W.2d at

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[5] The statute was amended in 2003. *See* 2003 Iowa Acts ch. 156, § 11.

785. We conclude defendant's sentence is not unconstitutional under the Eighth Amendment.

We affirm Perez-Mondragon's convictions and his sentence for robbery in the first degree.

AFFIRMED.