Opinion filed February 29, 2016

In The

Eleventh Court of Appeals

No. 11-14-00046-CR

JOE ANTHONY GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 441st District Court
Midland County, Texas
Trial Court Cause No. CR41608

M E M O R A N D U M O P I N I O N

Joe Anthony Gonzales appeals his jury conviction for assault involving family violence with a previous conviction for assault involving family violence. TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(2)(A) (West Supp. 2015). The trial court assessed punishment at confinement for a term of eight years in the Institutional Division of the Texas Department of Criminal Justice. In three issues on appeal, Appellant asserts that the evidence was insufficient to support his conviction, that the trial court erred when it admitted a copy of a previously entered protective order,

and that the trial court's imposition of an eight-year sentence of imprisonment constituted cruel and unusual punishment that was grossly disproportionate to the crime. We affirm.

Background Facts

Appellant began dating Maria Lucero in 2006. They have two children together. Appellant and Lucero had lived together in the past, but at the time of the incident, they were not dating or living together.

Lucero testified that, on the date of the incident, she had a friend drive her and her children to the Delux Inn in Midland County, where Appellant was staying. Lucero and her children walked upstairs to Appellant's room. His door was partially ajar. When she walked inside, Lucero noticed that the air conditioner had been knocked off the wall and broken items were on the floor. Lucero testified that Appellant appeared drunk and that she was going to leave with the children rather than staying there.

Lucero stated that, as she started to walk out of the room with her children, Appellant became violent toward her. Appellant began yelling and cussing at her. Lucero's son did not want to leave, so she bent down to pick him up. Lucero testified that, at that point, Appellant reached over and grabbed her hair. Lucero fell and her son hit his head on the wall. Lucero put her son down and called for her friend to come help.

Lucero then reached back inside the motel room to retrieve her bag. Lucero testified that Appellant pulled her into the room and onto the bed. Lucero stated that Appellant hit her and bit her. Lucero screamed for help. A man from the room next door came into Appellant's motel room and separated the two. The police arrived shortly thereafter.

Appellant testified at trial. He claimed that Lucero walked into the room and said that she was not going to stay. Appellant testified that he walked toward Lucero

and "she just went ballistic on me, started slapping me." According to Appellant, Lucero hit him with a closed fist, and he grabbed her hands. Appellant testified that Lucero calmed down after the neighbor separated them and that Lucero walked out of the room. Appellant stated that he grabbed her purse and shut the door to try to keep her out. Appellant claimed that Lucero forced her way back into the room and attempted to hit him. They ended up on the bed, and according to Appellant, Lucero put a finger in his eye. Appellant testified that he bit Lucero in self-defense because she was hurting him.

Analysis

In his first issue, Appellant contends that the evidence was insufficient to support his conviction. Specifically, Appellant alleges that the evidence presented by the State, namely that Appellant was the aggressor, was so insufficient that it was impossible that a rational jury could have returned a guilty verdict. Appellant asserts that he was acting in self-defense during the altercation with Lucero and that he was not the initial aggressor.

We review sufficiency of the evidence issues under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim.

App. 2007). When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict and defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

Appellant contends that the State did not refute his claim of self-defense. When a defendant challenges the legal sufficiency of the evidence to support rejection of a defense such as self-defense, we examine all of the evidence in the light most favorable to the verdict to determine whether a rational jury could have found the accused guilty of all essential elements of the offense beyond a reasonable doubt and also could have found against the accused on the self-defense issue beyond a reasonable doubt. *See Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). The defendant has the burden of producing some evidence to support a claim of self-defense. *Zuliani v. State*, 97 S.W.3d 589, 594–95 (Tex. Crim. App. 2003). Once the defendant produces that evidence, the State then bears the burden of persuasion to disprove the raised defense. *Id.* The burden of persuasion does not require the State to produce evidence to disprove the defense; it requires only that the State prove its case beyond a reasonable doubt. *Id.* A determination of guilt by the factfinder implies a finding against the defensive theory. *Id.* The issue of self-defense is a fact issue to be determined by the jury, which is free to accept or reject the defensive issue. *Saxton*, 804 S.W.2d at 912 n.5.

A person commits the offense of assault involving family violence with a previous conviction for assault involving family violence if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse, and it is shown that the defendant had been previously convicted of assault involving family violence. PENAL § 22.01(a)(1), (b)(2)(A). Bodily injury means "physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(a)(8). As applicable here, a person is justified in using force in self-defense when and to the degree he reasonably believes force is immediately necessary to protect him

against the other's use or attempted use of unlawful force. *Id.* § 9.31(a) (West 2011). A "[r]easonable belief" is that which "would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42).

Appellant contends that the State's case rests primarily on the testimony of Lucero. He alleges that there were inconsistences in her testimony when compared to the testimony of the other witnesses. We presume that the jury resolved the conflicts in Lucero's testimony in favor of the verdict and defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. Lucero denied that she was the aggressor with Appellant and claimed that she fought back in self-defense. She testified that Appellant grabbed her hair while she was holding her son and caused her to fall. She also stated that when she went back into the room to retrieve her bag, Appellant pulled her onto the bed and began biting her. The State admitted several photographs of Lucero's injuries. The police officers who arrived on the scene also testified to Lucero's injuries. On the other hand, Appellant claims that he acted in self-defense because Lucero poked him in the eye.

As noted previously, when the jury found Appellant guilty, there was an implicit finding against his self-defense theory. *Saxton*, 804 S.W.2d at 914. Considering all of the evidence in the light most favorable to the verdict, the jury could rationally have found beyond a reasonable doubt that Appellant committed the offense of assault involving family violence, rejecting his self-defense claim. *See id.*; *Padilla v. State*, 254 S.W.3d 585, 591 (Tex. App.—Eastland 2008, pet. ref'd) (evidence was legally sufficient to support jury's rejection of self-defense claim because victim testified that defendant was the aggressor and a rational juror could have believed her testimony and rejected defendant's self-defense claim). We overrule Appellant's first issue.

In his second issue, Appellant contends that the trial court erred when it admitted a copy of a protective order that had been granted in favor of Lucero against

Appellant. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *See Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

Appellant's trial counsel referenced the matter of the protective order during his cross-examination of Lucero. Specifically, he questioned her about giving a sworn affidavit in support of the application for the protective order. Counsel questioned Lucero about inconsistencies between her testimony at trial and the statements in the sworn affidavit. At the conclusion of Lucero's testimony, the prosecutor sought to offer the protective order granted in favor of Lucero against Appellant. Appellant's trial counsel initially acquiesced to its admission "[a]s long as the application [for the protective order] is admitted as well." However, Appellant's trial counsel subsequently objected to the admission of the protective order itself on the basis that it was irrelevant, unduly prejudicial, and misleading to the jury. Counsel made this objection prior to the trial court ruling on the State's request to admit the protective order. The State responded that Appellant had opened the door regarding the protective order when counsel questioned Lucero about whether she had prepared an affidavit in another case or testified in another case. The trial court overruled Appellant's objection, and the application for protective order, the attached affidavit, and the protective order itself were admitted into evidence.

Appellant initially asserts that the admission of the protective order was error because the State did not provide the requisite notice to Appellant about its intended use of extraneous offenses or bad acts. TEX. R. EVID. 404(b). However, Appellant did not object to the protective order on this ground at trial. Thus, Appellant waived this issue for appellate review. *See* TEX. R. APP. P. 33.1(a).

Appellant also contends that the admission of the application for protective order, along with the protective order itself, was unfairly prejudicial. He bases this contention on the "bad acts allegedly committed by Appellant, unrelated to the instant charges" set out in the application for protective order. Lucero's affidavit in support of the application for protective order provided details of three occasions wherein she alleged that Appellant committed family violence against her, including the incident serving as the basis for the underlying conviction. The protective order contained a finding "that family violence has occurred and that family violence is likely to occur in the future." However, the protective order did not make a specific finding that family violence occurred during the underlying incident.

Texas Rule of Evidence 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay or needless presentation of cumulative evidence. TEX. R. EVID. 403; *see Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009). Our analysis under Rule 403 includes, but is not limited to, the following factors: (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational yet indelible way, (3) the time needed to develop the evidence, and (4) the State's need for the evidence. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). Under Rule 403, it is presumed that the probative value of relevant evidence outweighs any danger of unfair prejudice. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

The State requested admission of the protective order and the supporting documentation to counter Appellant's self-defense theory. When an accused raises a self-defense theory, the State may introduce evidence of prior violent acts where the accused was an aggressor in order to show his intent and to rebut the defense. *Render v. State*, 347 S.W.3d 905, 921 (Tex. App.—Eastland 2011, pet. ref'd) (citing

Halliburton v. State, 528 S.W.2d 216, 218 (Tex. Crim. App. 1975)). Lucero's statements in the application for protective order and affidavit detailed prior altercations between her and Appellant that were similar in nature to the incident alleged in the indictment. These previous altercations were relevant because it made the likelihood that Appellant assaulted Lucero more probable. Additionally, the time needed to develop the evidence was brief, and it did not constitute the repetition of evidence that was already admitted. While the challenged evidence was prejudicial to Appellant, we do not believe that the evidence had a tendency to confuse or distract the jurors in an irrational way. In this regard, the court's charge contained an allegation of another instance of assault involving family violence involving an unknown victim for which Appellant had previously been convicted. After balancing the Rule 403 factors, we conclude that the trial court could have reasonably determined that the probative value of the evidence of the previous altercations was not substantially outweighed by the danger of unfair prejudice. *See id.* at 922. We overrule Appellant's second issue.

In his third issue, Appellant challenges his sentence of confinement for a term of eight years. Appellant alleges that his punishment constitutes cruel and unusual punishment and is grossly disproportionate to the crime. We note at the outset that Appellant made no objection to his sentence in the trial court, either at the time of sentencing or in any post-trial motion, on any grounds, nor did he ever lodge an objection, under constitutional or other grounds, to the alleged disparity, cruelty, unusualness, or excessiveness of the sentence. To preserve an error for appellate review, a party must present a timely objection to the trial court, state the specific grounds for the objection, and obtain a ruling. TEX. R. APP. P. 33.1(a). Therefore, Appellant has failed to preserve error and has waived his complaint on appeal. *See id.*; *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (Eighth Amendment issues are forfeited if not raised in the trial court.); *Solis v. State*, 945

S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (holding that a claim of grossly disproportionate sentence in violation of Eighth Amendment was forfeited by failure to object).

Even absent forfeiture, we conclude that Appellant's sentence did not constitute cruel and unusual punishment. The Eighth Amendment prohibits sentences that are "grossly disproportionate" to the offense for which the defendant has been convicted. *Bradfield v. State*, 42 S.W.3d 350, 353 (Tex. App.—Eastland 2001, pet. ref'd) (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)). When a sentence falls within the range provided by the legislature, it is generally not grossly disproportionate to the offense committed. *See, e.g.*, *Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973).

The offense of assault involving family violence is a third-degree felony if the defendant has a previous conviction for assault involving family violence. PENAL § 22.01(b)(2)(A). However, the State alleged a prior felony conviction for enhancement purposes to which Appellant pleaded "true." This enhancement elevated the applicable punishment range to that of a second-degree felony. *Id.* § 12.42(a). The statutory range of punishment for a second-degree felony is confinement for any term of not more than twenty years or less than two years. *Id.* § 12.33(a). Appellant does not argue that his sentence is not within the range that the legislature has provided.

However, if the sentence is grossly disproportionate to the offense or sentences in other similar offenses, the sentence may violate the Eighth Amendment even though it falls within the statutory punishment range. *See Bradfield*, 42 S.W.3d at 353. To evaluate the proportionality of a sentence, the first step is for us to make a threshold comparison between the gravity of the offense and the severity of the sentence. *Id.* When analyzing the gravity of the offense, we examine the harm caused or threatened to the victim or society and the culpability of the offender. *See,*

e.g., *Hooper v. State*, No. 11-10-00284-CR, 2011 WL 3855190, at *3 (Tex. App.—Eastland Aug. 31, 2011, pet. ref'd) (mem. op., not designated for publication) (citing *Solem v. Helm*, 463 U.S. 277, 291–92 (1983)). Only if grossly disproportionate to the offense, must we then compare Appellant's sentence with the sentences received for similar crimes in this jurisdiction or sentences received in other jurisdictions. *Bradfield*, 42 S.W.3d at 353–54.

Here, Appellant was convicted of the offense of assault involving family violence. It was his second conviction for this serious offense. A repeat offender's sentence is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284 (1980)) (internal quotation marks omitted). Therefore, in considering whether Appellant's sentence is "grossly disproportionate," we consider not only the present offense but also his criminal history. *Vrba v. State*, 69 S.W.3d 713, 724 (Tex. App.—Waco 2002, no pet.). As detailed above, the underlying incident was not the only allegation of family violence committed against the victim of the underlying offense. Furthermore, Appellant had a prior felony conviction for burglary of a building.

In reviewing a trial court's sentencing determination, "a great deal of discretion is allowed the sentencing judge." *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). We will not disturb a trial court's decision as to punishment absent a showing of abuse of discretion and harm. *Id.* We are hard-pressed to conclude that the trial court abused its discretion in imposing an eight-year sentence of confinement for Appellant given the severity of the offense, his criminal record, and his history of family violence with the same victim. We do not find that the sentence is grossly disproportionate to the offense committed by Appellant.

Consequently, we need not compare Appellant's sentence with the sentences received for similar crimes in this or other jurisdictions.[1] *See Solem*, 463 U.S. at 292. We overrule Appellant's third issue on appeal.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

February 29, 2016

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.

[1]In addition to not preserving the proportionality issue in the trial court, Appellant also did not submit any evidence pertaining to sentences for similar crimes in this or other jurisdictions.